Supreme Court, U.S.
FILED
07-859 DEC 27 2007
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

CHEMJECT INTERNATIONAL, INC.,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, JOSE MIRELES AND PATRICIA GENUCHI,
Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Texas, Thirteenth District

PETITION FOR WRIT OF CERTIORARI

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December 27, 2007

QUESTIONS PRESENTED FOR REVIEW

A brief introductory statement immediately follows the questions to set the scene for understanding the questions.

1. Does Texas law violate an unnamed class member's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment when a trial court has no duty, authority, or jurisdiction to rule on the merits of an unnamed class member's petition in intervention or motion which seeks:

(a) to enforce the provisions of the settlement agreement and judgment that render them null, void and vacated if the contemplated settlement cannot be concluded substantially as described in the settlement agreement; and

(b) to remove the class representatives and class counsel on the basis that they are inadequately representing the class;

and when there is no other viable Texas procedure for having its claims heard?

2. Is it a violation of an unnamed class member's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment when the trial court substitutes the designated beneficiary of the settlement proceeds, without providing unnamed class members with prior notice or an opportunity to be heard at a meaningful time and in a meaningful manner?

Brief Introductory Statement to Set the Scene

This appeal involves issues of constitutional due process and equal protection rights of unnamed class action members. Petitioner is an unnamed member of a settlement class that includes 5 million business and residential customers of Southwestern Bell Telephone Company throughout the State of Texas. As a class member, Petitioner is bound by the judgment and settlement agreement, which, among other things, released $800 million in alleged claims and enjoined the class. Respondents are the named plaintiffs and defendant in the class action.

The settlement was a purported *cy pres* settlement.[1] Pursuant to the agreed judgment and settlement agreement, and as detailed in the notice to the class, the designated beneficiary of the settlement funds[2] was an agency of the State of Texas known as the Telecommunications Infrastructure Fund Board, referred to herein as "TIFB." TIFB was specifically selected to receive the funds because it was the "best way to provide compensation to the Class" using its experience, infrastructure, and ability to "maximize" the benefits to the class.

The trial court entered an agreed judgment approving the settlement in May 2000, which was appealed by other unnamed class members. Three years later, while on appeal and before any

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[1] The *cy pres* doctrine has been used to disburse proceeds of a class action lawsuit when the amounts owing to each individual plaintiff are exceedingly small and/or identification of the amount due each individual would be excessively difficult.

[2] $3 million in cash and $3.75 million in service credits.

administration of the settlement had begun, TIFB was eliminated by Governor Rick Perry's Proclamation and Executive Order.

The judgment provides that the trial court retains continuing jurisdiction over the case, the parties, and administration and enforcement of the settlement. The judgment and settlement agreement also provide that they shall be null, void and vacated if the settlement cannot be concluded substantially as described in the settlement agreement. Upon learning of the Governor's plan to eliminate TIFB, Petitioner filed a petition in intervention and motion seeking enforcement of the provisions that render the settlement and judgment void.

Without notice or a hearing, the trial court granted Respondents' post-judgment motions requesting approval to distribute the funds to a different state agency, the Texas Workforce Commission, purportedly as a ministerial act. Thereafter, the trial court struck Petitioner's petition and motions on jurisdictional grounds. The subject appeals followed.

The Court of Appeals held that the trial court lacked the duty, authority and jurisdiction to rule on the merits of Petitioner's petition or motions, because it lost its plenary power 30 days after the date of the judgment (in 2000). The Court also held that Petitioner's appeal was untimely because its notice of appeal was not filed within this 30 day period. Citing Tex. R. App. P. 26.1(a)(2). The Texas Supreme Court approved the Court of Appeals' decision by denying Petitioner's petition for discretionary review.

PARTIES AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are Chemject International, Inc.; Southwestern Bell Telephone Company; Jose Mireles; and Patricia Genuchi. The following have an interest in the outcome of this appeal: Texas Workforce Commission c/o Texas Education Agency; Texas Education Agency; Texas Equal Justice Program.

Pursuant to Rule 29.6 of the Rules of this Court, Chemject states that it is a Delaware corporation, which is 100% owned by Ironhorse Accessories, Inc., which is not a publicly held corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Chemject International, Inc. ("**Chemject**") respectfully submits this petition for a writ of certiorari to the Court of Appeals of Texas, Thirteenth District.

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS BY LOWER COURTS

The judgment and opinion of the Thirteenth Court of Appeals are unpublished and are reproduced at App. 1, 3. The order of the Texas Supreme Court denying Chemject's petition for review is unpublished, and is reproduced at App. 51. The Thirteenth Court of Appeals' mandate is unpublished and is reproduced at App. 54.

The judgment and orders of the 357th Judicial District Court of Cameron County, Texas are unpublished, and are reproduced at App. 29, 30, 32, and 34.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Thirteenth Court of Appeals was filed on January 25, 2007. (App. 1, 3) A motion for rehearing was filed by Chemject on February 16, 2007, and denied by the Court of Appeals on March 15, 2007. (App. 53) The Texas Supreme Court granted Chemject's motion to extend time to file a petition for review until May 30, 2007. (App. 52) Chemject's petition for review was timely filed with the Texas Supreme Court on May 30, 2007. The Texas Supreme Court's order denying Chemject's petition for discretionary review was filed on September 28, 2007. (App. 51) This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, U.S.C.A. Const. Amend. 14, which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This petition raises important constitutional issues concerning the due process and equal protection rights of unnamed members in class action settlements in the State of Texas.

1. State Trial Court Proceedings. The subject class action was filed on July 13, 1998, as *Jose Mireles, et al. v. Southwestern Bell Telephone Company*, Cause No. 98-07-3003-E, in the 357th Judicial District Court of Cameron County, Texas. The class includes nearly five million Southwestern Bell Telephone Company ("**Southwestern Bell**" or "**SWBT**") business and residential customers throughout the State of Texas.

The subject settlement agreement was entered into by Respondents on or about December 15, 1999, (the "**Settlement Agreement**") (App. 66)[3] It provides for

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[3] Reference to the Appendix is designated by "App. __" (App. Followed by the page number of the Appendix.)

the *full release and discharge* of SWBT and other released parties, from any and all claims arising out of or relating in any way to the pass-through or collection of municipal fees in Texas, whether known or unknown. (App. 72) Indeed, the plaintiffs were agreeing to release over $800 million in alleged claims against Southwestern Bell for "municipal charge" billings on the class members' Southwestern Bell telephone bills. (I CR 317-18, 321) [4]

The settlement did not provide for any direct compensation to the class members -- no money, property or coupons. Instead, the settlement was a purported *cy pres* settlement with an alleged value of $10 million, out of which $2 million was to be paid to Class Counsel, $1.25 million to Southwestern Bell for notice and administrative costs, and the remainder to the Telecommunications Infrastructure Fund Board ("**TIFB**"), an agency of the State of Texas, in the form of service credits and $3 million in cash. *Id.* (App. 82-83)

Although there was no direct benefit to the class, a "selling point" made by Respondents in the notice to the class, and to the court, was that there would be substantial indirect benefits to the class by giving the money to TIFB. For example, certain restrictions and limitations placed on the use of the funds would "insure that the funds would inure primarily to the benefit of the Settlement Class, and TIFB will control the distribution of the funds." Further, and perhaps

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[4] References to the state court record are as follows: Reporter's Record: "__RR__"(Volume followed by RR, then page); Clerk's Record: "__CR__"(Volume followed by CR, then page); Clerk's Supplemental Record: "__CR __" (Supplement followed by CR, then page); Fairness Hearing Reporters Record: "__FH__" (Volume followed by FH, then page).

more importantly, Respondents represented that "disbursement through TIFB would utilize its pre-existing experience and infrastructure to administer the Settlement Funds effectively and efficiently" and that by "selectively combining the Settlement Funds with other TIFB monies, TIFB will multiply the benefits of the Settlement Funds and maximize benefits realization to the Class Members." See sections 2.B. and 2.C, infra.

At the fairness hearing on May 4, 2000, Respondents praised TIFB and the benefits it would provide to the class. Following the hearing, the court entered an agreed judgment approving the settlement. *Id.* (App. 34)

The judgment was subsequently appealed by two other unnamed class members, Michael Northrup and Max Wiesen, on grounds that are different than those being made by Chemject herein.

In early 2003, while the Northrup appeal was pending, Chemject learned of evidence indicating that the settlement had been obtained by fraud and collusion, including fraud on the court. These alleged fraudulent statements concerned the nature of the case, its history, the discovery conducted, the reasons for settlement, and the nature of the settlement. (I CR 312-14, 317-18, 429-30, 450-51) Chemject promptly filed a petition in intervention with the trial court, as well as a motion to set aside the settlement agreement, alleging extrinsic fraud. *Id.*

In May 2003, during the pendency of the Northrup appeal, Chemject learned that Texas Governor Rick Perry planned to eliminate TIFB. Upon learning that the elimination of TIFB was imminent, Chemject promptly supplemented its petition and motion,

adding this as an additional ground for declaring the settlement and judgment void, and specifically alleging that the settlement can no longer be concluded substantially as described in the settlement agreement, and therefore, the settlement and judgment are void according to their express terms.

On June 22, 2003, TIFB was eliminated by Texas Governor Rick Perry's Proclamation. (App. 57) On August 11, 2003, Governor Perry entered an Executive Order ("**Executive Order**") stating that all TIFB "grant management, reimbursement of expenses, *and grant close-out functions*" be assigned to the Texas Workforce Commission effective September 1, 2003. Significantly, a timeline was established for the Texas Workforce Commission to close out all TIFB grants and funding by May 31, 2004. (App. 62)

On January 30, 2004, the Texas Supreme Court denied Northrup's petition for review without comment. (II CR 608) On February 25, 2004, mandate was issued by the clerk of the Court of Appeals.[5] *Id.*

On June 15, 2004, Respondents filed a joint motion to establish the administration of the settlement ("**Joint Motion**"). (II CR 591) The Joint Motion failed to address Chemject's claims that the settlement agreement and judgment were void according to their express terms; instead, it essentially sought to re-write the settlement by substituting the Texas Workforce Commission for TIFB. In submitting the Joint Motion, class counsel

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[5] The Northup appeal is not the subject of this petition.

represented to the trial court that granting the Joint Motion was a "mere ministerial act." (II CR 589)

On June 17, 2004, the trial court entered an order granting the Joint Motion, without any prior notice to Chemject or the other class members, and without a hearing. (App. 32) Notably, the Joint Motion and this order occurred after the May 31, 2004 deadline that was set in the Executive Order for the Texas Workforce Commission to end all TIFB grants and funding; therefore, the Texas Workforce Commission did not have any authority to administer the settlement funds (much less, maximize the benefits to the class) as contemplated, at the time the order was signed.

Upon learning of the order, Chemject filed an emergency motion to reconsider and vacate it. (II CR 603) In Chemject's motion, Chemject addressed Governor Perry's executive order, and pointed out, among other things, that 1) the Texas Workforce Commission was not the same as TIFB and could not provide the benefits that were the basis for naming TIFB as beneficiary of the settlement funds; 2) the Settlement Agreement had no provision for naming a substitute for TIFB; and 3) the settlement cannot be concluded substantially as described in the Settlement Agreement, and should be declared void.

A hearing was set for September 23, 2004, on all pending motions; however, at the hearing, the trial court only heard Southwestern Bell's plea to the jurisdiction and motion to strike Chemject's petition and motion. (II CR 679) (RR Vol. I of I) Although Chemject argued that the trial court should hear its motion to set aside the settlement, regardless of whether or not the intervention was granted (1 RR 5,

l. 10 – 10, l. 10), the trial court refused. (1 RR 45, l. 25 – 46, l. 3) Instead, the court entered an order granting Southwestern Bell's plea to the jurisdiction, and striking Chemject's petition and motions. (App. 29) (1 RR 46-47)

Also on September 23, 2004, the trial court entered an order "clarifying" its June 17, 2004 order granting the Joint Motion. (App. 30) This order was in response to a motion filed in July 2004 by the Texas Equal Justice Programs, a non-party hoping to receive some of the TIFB funds. (II CR 725-726)

An appeal to the Thirteenth Court of Appeals followed.

A. Relevant Terms of the Settlement Agreement. As further background, the Settlement Agreement contained the following provisions (App. 66):

Section I of the Settlement Agreement defines "Final Approval" as:

> the date of occurrence of the *last to occur* of each of the following: (a) entry of an Order and Final Judgment substantially in the form attached hereto as Exhibit "E" finally approving this Agreement; and (b) either expiration of all direct appeal periods or the final affirmance of the Final Judgment by the highest court having jurisdiction of the appeal of such Final Judgment, or the final dismissal or denial of any and all appeals from the Final Judgment. (Emphasis ours)

Section III.D.2-6 of the Settlement Agreement provides, in pertinent part, as follows:

2. Upon Final Approval and in exchange for the consideration provided in this Agreement, SWBT will pay the sum of Ten Million Dollars ($10,000,000) into the Settlement Benefits Fund in the manner prescribed below:

(a) Three Million Dollars ($3,000,000) shall be paid in cash; and

(b) Seven Million Dollars ($7,000,000) shall be paid in Service Credits.

3. SWBT may offset the Service Credits portions of section III.D.2.c. above by any or all of the following:

(a) Notice costs incurred by SWBT pursuant to section III.E. of this Agreement, up to a maximum amount of One Million Two Hundred and Fifty Thousand Dollars ($1,250,000).

(b) Costs incurred by SWBT for payment of the Administrator pursuant to paragraph III.E of this Agreement.

(c) Any attorneys' fee award paid by SWBT pursuant to paragraph III.H of this Agreement up to the Maximum Fees and Expenses.

4. The Three Million Dollars ($3,000,000) cash component of the Settlement Benefits Fund shall be paid in its entirety to the TIFB in the form of two separate grants as follows:

(a) A grant to the TIFB in the amount of Two Million Dollars ($2,000,000) to be used or distributed by the TIFB for salaries of regional Web Librarians for the Texas Internet

Collaborative Community Networks ("CCNs") for the two-year life of the program.

(b) A grant to the TIFB in the amount of up to One Million Dollars ($1,000,000) to be used or distributed by the TIFB for local advertising of websites or for training of users or Web Librarians for the CCNs.

5. SWBT shall provide the cash grants specified above in sections III.D.2.(a) and III.D.4(a)-(b) to the TIFB within ninety (90) days of Final Approval.

6. Upon Final Approval and in exchange for the consideration provided in this Agreement, SWBT will use all measures reasonable necessary to implement the Plan. SWBT shall begin the implementation of the Plan no less than ninety (90) days after the Final Approval.

. . .

Section III.N. of the Settlement Agreement provides, in pertinent part, as follows:

1. If this Agreement is terminated for any reason prior to Final Approval, or if any of the orders set out in the Exhibits to this Agreement are not entered substantially as reflected in those Exhibits, *or if the settlement contemplated by this Agreement is not concluded substantially as described in this Agreement with an order of the Court approving the settlement, the Agreement and all other acts taken to effect a proposed settlement will be void and of no effect* . . .

2. If Final Approval does not occur, or *if this Agreement is terminated or canceled pursuant*

> *to its terms, Plaintiffs and SWBT shall be deemed to have reverted to their respective status as of the date and time immediately prior to the execution of this Agreement, and they shall proceed in all respects as if this Agreement and related orders had not been executed. In such event, the terms and provisions of this Agreement shall have no further force and effect with respect to Plaintiffs and the Released Parties and shall not be used in this or any other litigation or any other proceeding for any purpose, and any orders or judgment entered by the Court in accordance with the terms of this Agreement shall be treated as vacated, nunc pro tunc.*

(Emphasis added.)

B. Relevant Provisions of the Settlement Notice. The notice to class members (the "**Notice**") informed the class that the settlement proceeds would be disbursed to TIFB, and that TIFB would maximize the benefit to the class. (App. 95) The Notice stated, in pertinent part, as follows:

> All Settlement Class members who choose not to timely exclude themselves from the Settlement Class will receive the benefits of this Settlement and will be bound by the resulting Judgment in the Lawsuit.
>
> In deciding to enter into this Settlement, Plaintiffs considered all of the benefits this Settlement provided to the Class. Some of these benefits include:
>
> 1. A total settlement value of ten million dollars;
>
> 2. Facilitation of the establishment of

communication and information networks designed to enhance the community and enrich lives;

3. Provision of funding necessary for the establishment of an initiative to involve Texas residents with local public schools, libraries, not-for-profit health care facilities and institutions of higher education to create and operate a multi-purpose, community-based telecommunications network; and

4. Provision of funding to enable equitable access to information, a broad range of enriched local content development, and local telecommunications planning and training. . . .

Class Counsel determined that a settlement that provides benefits to various Texas communities in which Class Members reside rather than one that makes nominal, random payments to individuals that may or may not correspond to actual injuries suffered is preferable.

Providing Money To TIFB Provides Real Benefit – The Settlement Funds will be disbursed to TIFB, *a governmental agency which is constituted for the purpose of benefiting persons like Class Members.* Furthermore, certain restrictions and limitations have been placed on the use of the Settlement Funds to insure that the Settlement Funds inure primarily to the benefit of the Settlement Class. The TIFB will

control the distribution of the Settlement Funds. (Emphasis ours)

Providing The Money To The TIFB Maximizes Benefits – Disbursement through the TIFB will utilize its pre-existing experience and infrastructure to administer the Settlement Funds effectively and efficiently. For example, *by selectively combining the Settlement Funds with other TIFB monies, TIFB will multiply the benefits of the Settlement Funds and maximize benefits realization to the Class Members.* (Emphasis ours)

If you choose to remain a Settlement Class Member . . . *[y]ou will be bound by any judgment or other final disposition of this case and may participate as a member of the Settlement Class in any settlement.* (Emphasis ours)

C. The Fairness Hearing. On May 4, 2000, the Honorable Fernando Mancias, a visiting judge, presided over the fairness hearing. At the hearing, certain material statements and representations were made about the discovery conducted during the case, the nature and history of the case, the settlement, and benefits. (FH RR Vol. 2 and 3) At the conclusion of the hearing Judge Mancias entered judgment approving the Settlement Agreement.

In their argument to the trial court, class counsel and their expert witness focused on the propriety of giving all of the settlement proceeds to TIFB. Class counsel spoke at length about the reasons for allocating the proceeds to TIFB and explained that TIFB would be able to leverage the grants to obtain

more funding from other sources so that the size of the funding would almost triple to $30,000,000. Mr. Tillotson, one of the class' counsel, told the trial court that the funding would go to:

> the Texas Telecommunications Infrastructure Program. They are going to take that ten million dollars and they are going to use it to start putting high tech internet in various communities, centers, in schools all throughout the State of Texas so that every citizen who is part of this class is going to either directly or indirectly receive some benefit from this money. It's going to be in towns like cities in Brownsville, in Dallas and elsewhere. It's going to be directed at community centers and schools." (FH 2 RR 47-48)

In explaining why they chose TIFB, Mr. Tillotson stated:

> We talked about identifying organizations and finally we settled on the Texas Telecommunications Infrastructure Board, which is dedicated to putting Internet high-tech Web access in community centers, schools all over the State of Texas. Because they could take this money and put it to good that everyone in the State could use it in some way or another. You are going to hear testimony from their director who is going to talk about the kinds of things that they are going to be able to do this with this money. But there is a second thing that was absolutely critical to why we wanted to give the money to TIF. They assured us that they could take this ten million dollars and get matching grants of 20 million

> or more, up to 20 million more. So our ten million dollars suddenly became thirty million dollars . . . . The ten million dollars is paid to TIF. We split it up between cash and services. At least three million dollars would be cash to go out and spend it on things that they couldn't normally do, like hire Web librarian, do advertising, things that they can't get funding for. 4.6 million dollars will be in service credits for things like phone lines, high access Internet speed, ISD lines that they will be using to go set all this up. (FH 2 RR 201-204)

Class counsel's expert witness, Edward Sherman, was examined about the appropriateness of selecting TIFB as the beneficiary of the funds. On direct examination, Sherman testified that:

> . . . because of the manner in which TIF is set up, that is they can leverage by putting down certain funds and then getting matching or other additional funds for foundations and other entities, that three million dollars in cash may result in a substantially larger recovery for TIF. Then seven million dollars will be set aside in non-cash payments, except that two million of that will go to the attorneys. (FH 3 RR 25-26)

Sherman then "complimented" class counsel for selecting the TIFB:

> . . . And this I compliment the counsel their solution here, because this isn't just merely giving the money to the Red Cross or some other worthy charitable organization, but it goes directly into telecommunications and relates to benefits that can be obtained by all

> the classes in some way be serving the public needs and telecommunications. (FH 3 RR 35-36)

Mr. Cox, another one of the class' counsel, emphasized that because of the *cy pres* nature of the entire settlement, the proceeds needed to be allocated to a worthy beneficiary for use in matters related to the nature of the case, and that TIFB was just that type of beneficiary. (FH 3 RR 123-125)

D. Relevant Trial Court Findings. In its findings of fact and conclusions of law, the trial court found that the payment to TIFB is the "best" way to provide compensation to the Class. (App. 42, at 47)

E. Relevant Terms of the Agreed Judgment. For purposes of this appeal, the relevant terms of the agreed Order and Final Judgment Nunc Pro Tunc dated May 22, 2004 (the "**Judgment**") (App. 34), are as follow:

Paragraph 11 of the Judgment provides:

> *In the event that the settlement does not become Final in accordance with the terms of the Settlement Agreement, then this Order and Final Judgment shall be rendered null and void and be vacated.* (Emphasis ours).

Paragraph 12 of the Judgment provides:

> Without affecting the finality of this Order and Final Judgment and until the Satisfaction of Judgment is filed, the Court shall retain *continuing jurisdiction* over this case and the parties, including all members of the Settlement Class; the administration and enforcement of the settlement; and the benefits to the Settlement Class, including for such

purposes as supervising the implementation, enforcement, construction and interpretation of the Settlement Agreement. (Emphasis ours)

2. Chemject Raised Constitutional Questions with the Trial Court. In Chemject's response to Southwestern Bell's plea to the jurisdiction and motion to strike, Chemject raised constitutional due process issues, citing *Mathews v. Eldridge* and *Hansberry v. Lee*, infra, and its standing, citing *Devlin v. Scardelletti*, infra. In Chemject's emergency motion to vacate the court's order of June 17, 2004, Chemject raised the following constitutional issues:

> Demonstrating their disregard for the interests of the Class and due process, Plaintiffs and their counsel have joined with SWBT in asking the Court to enter an Order establishing a purported settlement administration of a class action Settlement Agreement and Judgment that are void pursuant to their own terms, as a result of the impossibility of performance thereof.
>
> The trial court bears the burden under Rule 42 to police the proceeding to minimize conflicts of interest and, primarily, to protect absent class members: The drafters designed the procedural requirements of Rule 23, especially the requisites of subsection (a), so that the court can assure, to the greatest extent possible, that the actions are prosecuted on behalf of the actual class members in a way that makes it fair to bind their interests. The rule thus represents a measured response to the issues of how the due process rights of absentee interests can be protected and how

absentees' represented status can be reconciled with a litigation system premised on traditional bipolar litigation. (cites and footnote omitted)

Settlement classes ... make it more difficult for a court to evaluate the settlement by depriving the judge of the customary structural devices of Rule 23 and the presumptions of propriety that they generate. Ordinarily, a court relies on class status, particularly the adequacy of representation required to maintain it, to infer that the settlement was the product of arm's length negotiations.... In particular, settlement classes create especially lucrative opportunities for putative class attorneys to generate fees for themselves without any effective monitoring by class members who have not yet been apprised of the pendency of the action. (cites omitted) Some commentators have even warned that the class action device may be used in an offensive and collusive manner in order to foreclose future individual claims. (cites omitted)

3. Chemject Raised Constitutional Questions with the Texas Court of Appeals. Chemject appealed the trial court orders of June 17 and September 23, 2004, to the Thirteenth Court of Appeals on the grounds that the orders violate Chemject's (and the class') rights to due process and equal protection under the Fourteenth Amendment. More specifically, the following issues, among others, were raised in Chemject's opening brief:

> 1. Does a trial court have the duty, authority and jurisdiction to rule on the merits of an unnamed class member's petition in intervention or motion seeking to have the class action settlement and agreed judgment declared void pursuant their respective terms and conditions, or based upon (i) impossibility of performance of the settlement agreement, (ii) failure of consideration, or (iii) fraud?
>
> 2. If the trial court has no authority or jurisdiction to rule on the merits of the unnamed class member's petition in intervention or motion, has the class member's right to equal protection and due process under the Fourteenth Amendment been violated?

Further, Chemject's petition stated, *inter alia*, the following point of error:

> The district court erred in granting SWBT's Plea to the Jurisdiction and Motion to Strike, because the refusal to hear and rule on the merits of Appellant's petition in intervention and motion is a denial of Appellant's right to due process and equal protection under the Fourteenth Amendment to the United States Constitution.

In its brief, Chemject argued, in relevant part, as follows:

> Due process as well as Texas and Federal jurisprudence required that Appellant's motion, as an unnamed class member, be heard by the trial court, regardless of the propriety of Appellant's petition in intervention. Appellant's right to equal protection and due process under the

Fourteenth Amendment to the United States Constitution will be violated if there is no forum for Appellant's claims to be heard. Equity also required that the trial court address Appellant's claims that the Judgment was obtained by fraud. The trial court erred by substituting the Texas Workforce Commission in place of TIFB. The substitution should not have been treated as a ministerial act, but required deliberation, decision and judgment by the trial court. The trial court erred by striking Appellant's petition in intervention and refusing to hear Appellant's motion. . . . If Appellant is denied the ability to proceed with its petition and motions, it's constitutionally protected right to due process would be violated.

Finally, permitting the trial judge to materially alter a settlement agreement would run afoul of both statutory and due process concerns that require giving notice, of all material terms of settlement, to the class members. (cite omitted) First of all, due process, especially in settlement class actions, requires that class members be given notice of the proceeding itself. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848, 119 S.Ct. 2295, 2315 144 L. Ed. 2d 715, 741 (1999). Secondly, TEX. R. CIV. P. 42 (e) specifically requires that the parties be notified of the terms of any settlement. Thus, if due process and Rule 42(e) would require notice of the terms of a settlement, then they would also require that the class members be given notice of any material change to the settlement because an altered

settlement is, in essence, a new bargain. In conclusion, just as in traditional single plaintiff, single defendant litigation, the trial judge, in class action cases, does not have the authority to make material modifications to a bargained for aspect of the settlement agreement.

The United States Supreme Court has said that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. at 333, 96 S.Ct. 893, 909 (1976). "The judicial model of an evidentiary hearing is neither a required, nor even the most effective method of decision making in all circumstances." *Id.*

Due process is satisfied if the procedures which are followed are "tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case." *Id.* There is a failure of due process in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. *Hansberry v. Lee*, 61 S.Ct. 115 (1940). The due process clause in the federal Constitution precludes binding an absent class member by a class action unless the class representative provided adequate and full representation. *Id.* at 118-119. Due process, equal protection and equity require that Appellant's petition and motion be heard by the district court. If the jurisprudence of this State denies unnamed

> settlement class members the ability to be heard when seeking relief from a judgment and settlement agreement that they believe is void pursuant to its own terms or due to impossibility of performance, or denies them the ability to appear in court and complain about the adequacy of the purported class representatives and class counsel after the judgment has been affirmed, then the State of Texas would deny unnamed class members the ability to protect their rights and property, and thereby violate the Fourteenth Amendment to the United States Constitution.
>
> Although Appellant is an unnamed class member, both this Court of Appeals, as well as the United States Supreme Court, have held that an unnamed member in a settlement class has standing to intervene and be heard. In *Devlin v. Scardelletti*, 122 S. Ct. 2005, 2009 (2002), the United States Supreme Court stated that "a member of the [class] . . . has an interest in the settlement that creates a 'case or controversy' sufficient to satisfy the constitutional requirements of injury, causation, and redressability."

4. The Court of Appeals Failed to Address Chemject's Constitutional Issues. Nevertheless, on January 25, 2007, without hearing oral argument, the Court of Appeals dismissed Chemject's appeal, stating that Chemject's notice of appeal was not timely, and had to be filed within 30 days from the date of the original May 2000 Judgment (citing Texas Rule of Appellate Procedure 26.1(a)(2)). In its opinion, the Court of Appeals did not address Chemject's constitutional issues, stating as follows:

> In its second issue, Chemject generally contends, without supporting authority, that the striking of its petition in intervention would constitute a due process violation. *See* Tex.R.App.P. 38.1(h) (setting out that contentions are to be supported by clear and concise arguments with appropriate citations to authorities and to the record). However, Chemject filed a separate bill of review proceeding. We address the appeal of that proceeding below. Chemject has not explained why the bill of review does not satisfy its due process needs. Thus, this argument is not persuasive, and we overrule Chemject's second issue.

Chemject timely filed a motion for rehearing. In its motion, Chemject raised its Constitutional issues again, and explained, in relevant part, as follows:

> Appellant has alleged that Plaintiffs and their counsel not only misled the trial court, appellate courts and class, by claiming that they conducted sufficient discovery and reasonable confirmatory discovery, but they also have failed to represent the class by supporting a settlement that should be declared void.
>
> As an unnamed class member, Chemject has the fundamental right to have its motion claims heard. If denied that right, Chemject's due process and equal protection rights are violated. This issue is clearly, concisely and thoroughly addressed in Chemject's brief, citing to authority and the record. (See

Appellant's Brief, pp. xiv, 14, 24-25, 45-46, 48-49)

The Court apparently misunderstands the nature of Chemject's due process claims. Since Chemject is a party to the judgment as an unnamed class member, Chemject has the right, just the same as any of the named parties, to seek enforcement of the express terms and conditions of the settlement agreement, and to have its motion heard and ruled upon. The United States Supreme Court has said that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. at 333, 96 S.Ct. 893, 909 (1976). For Chemject, this opportunity did not occur. Here, Chemject's right to be heard is especially important since there is substantial evidence that the Mireles parties and their counsel engaged in fraud and collusion. If these allegations are found to be true, then clearly Chemject has no adequate representation through "class counsel" and can only receive due process by filing its own motion and having it heard at a meaningful time and manner, which in this case should have occurred more than two years ago.

Equal protection under the Fourteenth Amendment directs that similarly situated circumstanced shall be treated alike. See *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). With respect to being a party to the settlement agreement, Chemject's circumstances are similar to every other party

to the agreement, including Appellees. Yet Appellees' joint motion to establish a settlement administration was heard by the trial court (albeit under the pretence that it was a ministerial act). If the trial court has the power to hear Appellees' joint motion to establish a settlement administration, then it has the power to hear Chemject's motion to enforce the settlement agreement. Otherwise, Chemject is denied equal protection.

The Court also states that Chemject has not explained why the bill of review does not satisfy its due process needs. . . . [A] bill of review is not available for any of Chemject's claims except its extrinsic fraud claims, and any claims that might fall under the category that a court officer improperly executed his official duties. Chemject's claims to enforce the settlement agreement and judgment, and claims to vacate the judgment based upon changed circumstances, are clearly inappropriate for a bill of review.

The Court states in its Opinion that "Chemject's challenges to the settlement agreement could only be raised in a bill of review." By characterizing Chemject's claims as a "challenge" to the settlement agreement, it appears that the Court considers Chemject's claims more in the nature of an attack on the settlement agreement and judgment. However, as stated above, Chemject's primary claims seek the enforcement of the settlement agreement (albeit to have it declared void pursuant to its terms), and Chemject's secondary claims seek to have it declared void

because of changed circumstances. Nevertheless, the question that should be asked is "Why are Chemject's motion and petition considered a "challenge" and a nullity, when Appellees' motion to establish a settlement administration is deemed proper? This inconsistency cannot be reconciled. Only Chemject's fraud claims could arguably be considered an attack on the settlement agreement, because fraud can be used to vitiate or rescind an agreement.

A bill of review remedy is an equitable proceeding. Chemject's claims seeking to enforce the settlement agreement and judgment according to their terms, is based in contract, not equity. Since a bill of review remedy is an equitable proceeding, these contract claims are inappropriate for a bill of review. Furthermore, a bill of review is also inappropriate for Chemject's enforcement claims, and claims based upon changed circumstances, because under existing Texas precedent only extrinsic fraud will support a bill of review, except when the petitioner can demonstrate that the judgment resulted from his reliance on a court officer who improperly executes his official duties. See *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 752 (Tex.2003); *Transworld Financial Services Corp. v. Briscoe*, 722 S.W.2d 407, 408 (Tex.1987). Therefore, a bill of review is not available for these claims. Only Chemject's fraud claims may be a basis for bill of review relief.

> For the foregoing reasons, and as stated in Chemject's brief, Chemject submits that it has been denied due process and equal protection by the trial court's orders and by the Court's Opinion.

On March 15, 2007, the Court of Appeals denied Chemject's motion for rehearing.

5. Chemject Raised Constitutional Questions with the Texas Supreme Court. The Texas Supreme Court granted Chemject's motion to extend time to file a petition for review. On May 30, 2007, Chemject timely filed its petition for review, raising the following issues:

> After an appeal has been concluded and mandate issued affirming a judgment approving a class action settlement,
>
> Does the trial court have the jurisdiction, power, authority and duty to hear a motion filed by an unnamed class member challenging the validity and enforceability of a class action settlement agreement and judgment when such challenge is based upon the express terms of the settlement agreement and judgment, and upon changed conditions?
>
> If "Class Counsel" fails or refuses to act on behalf of the class to have the settlement and judgment declared void pursuant to their terms, are unnamed class members denied constitutional due process and equal protection if they are prohibited from being heard on such matters?
>
> Does an unnamed class member have the right to be heard on a motion that seeks to

enforce the express terms and conditions of settlement agreement and judgment by having them declared void?

Does an unnamed class member have the right to be heard on a motion that seeks to have the settlement agreement and judgment declared void based upon changed conditions?

May the trial court simply substitute the beneficiary of a class action settlement as a "ministerial act", when the specific beneficiary named in the settlement agreement was a material bargained for aspect of the settlement and the benefits of having the specific beneficiary were described in the class action settlement notice?

Must another notice pursuant to Tex. R. Civ. P. 42(c)(2) be given to the class before the court may approve a material change to a class action settlement agreement?

In addition to the foregoing issues, Chemject made the same constitutional arguments to the Texas Supreme Court as it made to the Court of Appeals. See, supra.

After requesting and receiving responses from Respondents, Chemject's petition for review was denied on September 28, 2007.

REASONS FOR GRANTING THE PETITION

Under Texas law, as held by the Thirteenth Court of Appeals and approved by the Texas Supreme Court, Chemject's (and the other settlement class members') due process and equal protection rights cannot possibly be satisfied under any Texas procedure.

Here, the Judgment provides that the trial court retains *continuing jurisdiction* over this case, the parties (including all settlement class members), and the enforcement, construction and interpretation of the Settlement Agreement. Federal courts have held that such language implies that the retention is meant to be exclusive. See *Flanagan v. Arnaiz*, 143 F.3d 540, 545 (9th Cir. 1998) (cites omitted).

In all class actions, the Due Process Clause requires that the named plaintiff at all times adequately represent the interests of the absent class members. *Phillips Petroleum Co. v. Shutts,* supra; 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) Furthermore, the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, supra. Indeed, courts often hear post-judgment motions to enforce class action settlement and judgments. For example, see *Gates v. Cook*, 234 F. 3d 221 (5th Cir. 2000); *Kortebein v. American Mut. Life Ins. Co.*, 49 S.W.3d 79 (Tex. App.—Austin 2001) (Every court with jurisdiction to render a judgment has the inherent power to enforce its judgments.); *In re VMS Securities Litigation,* 145 F.R.D. 458 (N.D.Ill.1992), *aff'd in relevant part,* 21 F.3d 139 (7th Cir.1994).

In *Gates v. Cook*, 234 F. 3d at 229, the Appellees urged that the unnamed class members' post-judgment motions for intervention and substitution of counsel were untimely. The Fifth Circuit held that such motions made during the ongoing administration of a class action settlement by a district court are not *per se* untimely. *See also United Airlines, Inc. v. McDonald,* 432 U.S. 385, 394-96, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977) (putative class

members' post-judgment motion to intervene for purposes of appeal was timely filed).

Another aspect of this case that is similar to other class action settlements, both state and federal, is the provision in the Settlement Agreement and Judgment providing that if the settlement is not concluded substantially as described in the Settlement Agreement, then the Settlement Agreement and Judgment will be null and void, and the parties returned to their status immediately prior to the settlement. This language is not surplusage. Numerous federal and state courts have included similar language in their settlement agreements and judgments, particularly in class actions.[6]

In *Perez v. Rent-A-Center, Inc.*, 186 N.J. at 199-202, the New Jersey Supreme Court construed similar language consistent with Chemject's interpretation of

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[6] For example, see *Aguayo v. Oldenkamp Trucking*, 2006 WL 3020943, 17 (E.D. Cal. 2006); *Lorenzo v. Brands*, 2006 WL 2855009, 3 (D.N.H. 2006); *Perez v. Rent-A-Center, Inc.*, 186 N.J. 188, 199-202, 892 A.2d 1255, 1261-63, (N.J. 2006); *In re Telecommunications, Inc. Shareholders Litigation*, 2006 WL 3391102, 3-4 (Del.Ch. 2006); *In re Xcel Energy, Inc. Securities, Derivative & ERISA Litigation*, 364 F.Supp.2d 1020, 1025 (D. Minn. 2005); *Fortin v. Ajinomoto U.S.A., Inc.*, 2005 WL 3739852, 3 (Mass.Super. 2005); *In re Lutheran Broth*, 2004 WL 2931352, 14 (D. Minn. 2004); *In re: E.W. Blanch Holdings, Inc. Securities Litigation*, 2003 WL 23335319, 4 (D.Minn. 2003); *In re Ikon Office Solutions, Inc. Securities Litigation*, 209 F.R.D. 94, 112 (E.D.Pa. 2002); *Weddle v. Frito-Lay, Inc.*, 2001 WL 182374, 3 (N.D.Cal 2001); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 1997 WL 888989, 8 (D. Mass 1997); *Osher v. SCA Realty I, Inc.*, 945 F.Supp 298, 310 (D.D.C. 1996); *In re International Murex Technologies Corp. Securities Litigation*, 1996 WL 1088899, 7 (E.D.N.Y. 1996); *Garza v. Sporting Goods Properties, Inc.*, 1996 WL 56247, 37 (W.D.Tex. 1996).

Section III.N.2 of the Settlement Agreement. Of course, this language plainly means that if the contemplated settlement fails, then the settlement agreement and judgment are null and void, and the parties are returned to their respective status immediately prior to the settlement so that the suit can proceed as if the settlement and Judgment had never been entered.

The Court of Appeals acknowledged that a trial court has the inherent power to enforce its own judgment. (App. 8-9) ("any document, *other than a motion to enforce or clarify*, filed after the expiration of the trial court's plenary jurisdiction, would be a nullity as a suit ends when the trial court's plenary power over the proceeding ends.") (Emphasis ours.) Further, the Texas Supreme Court has previously held that even after it has affirmed a lower court's judgment, the trial court (alone) has the jurisdictional power to vacate or modify the judgment *because of changed conditions*. *City of Tyler v. St. Louis Southwestern Ry. Co. of Tex.*, 405 S.W.2d 330, 332 (Tex. 1966). Of course, all of these points were raised in Chemject's briefing filed with the Court of Appeals and Texas Supreme Court. Nevertheless, the Court of Appeals concluded that the trial court lacked the "plenary power" to hear Chemject's motion after its plenary power expired, i.e., 30 days after the Judgment was entered in May 2000. The Court dismissed Chemject's appeal citing Texas Rule of Appellate Procedure 26.1(a)(2) (a notice of appeal must be filed within thirty days after the judgment is signed, except, among other things, it must be filed within ninety days after the judgment is signed if a motion to modify is timely filed.) Since Chemject did not file a notice of appeal in within this period

following the May 2000 Judgment, the Court held that Chemject's appeal was untimely. Of course, this is untenable, since it was impossible for Chemject (or anyone else) to appeal the trial court's decision regarding the elimination of TIFB in 2000, since TIFB was not eliminated until 2003. By this decision, Chemject's rights under the Due Process Clause have been violated.

As a settlement class member and unnamed party, bound by the terms of the Judgment and settlement, Chemject's similarities to Respondents should be obvious. Clearly, Chemject has standing. Its actions were both prompt and timely. Nevertheless, the trial court granted Respondents' Joint Motion in June 2004, and later, on Texas Equal Justice Programs' motion, the court "clarified" it. By treating Chemject differently under substantially similar circumstances, Chemject has been denied equal protection under the law.

The Court of Appeals stated that "[h]aving concluded that the trial court's plenary power had expired, Chemject's challenges to the settlement agreement could only be raised in a bill of review." Clearly, Chemject was not "challenging" the Settlement Agreement; rather, Chemject was seeking to enforce the terms of the Settlement Agreement and Judgment by having them declared void pursuant to paragraph 11 of the Judgment and section III.N. of the Settlement Agreement.

The Court further stated that "Chemject has not explained why the bill of review does not satisfy its due process needs. Thus, this argument is not persuasive, and we overrule Chemject's second issue." (App. 10-11). However, as Chemject explained in its

briefing, the enforcement of the agreed judgment and settlement agreement are issues of contract, and therefore are not a basis for an equitable bill of review.[7] This should have been obvious, considering that the Court of Appeals described a bill of review procedure as follows:

> To prevail on a bill of review, Chemject must "allege and prove: (1) a meritorious defense to the cause of action alleged to support the Judgment, (2) which [it] was prevented from making by the fraud, accident or wrongful act of the opposing party, (3) unmixed with any fault or negligence of [its] own." *Baker v. Goldsmith,* 582 S.W .2d 404, 405-07 (Tex.1979); *Mowbray v. Avery,* 76 S.W.3d 663, 682 (Tex.App.-Corpus Christi 2003, pet. denied). In addition to the foregoing requirements, "[o]nly extrinsic fraud will support a bill of review." *King Ranch, Inc. v. Chapman,* 118 S.W.3d 742, 752 (Tex.2003); *see Tice v. City of Pasadena,* 767 S.W.2d 700, 702 (Tex.1989).

(App. 13) Nowhere in the Court's analysis of a bill of review is there any indication that a bill of review would be a proper procedure for Chemject's claims.

In *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751-752 (Tex. 2003), the Texas Supreme Court described a bill of review as follows:

> A bill of review is an equitable proceeding to set aside a judgment that is not void on the face of the record but is no longer appealable or

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[7] Also, Texas does not have a rule or statute comparably to Fed. R. Civ. P. 60(b).

> subject to a motion for new trial. (cites omitted) A bill of review is proper where a party has exercised due diligence to prosecute all adequate legal remedies against a former judgment, and at the time the bill of review is filed, there remains no such adequate legal remedy still available because, through no fault of the bill's proponent, fraud, accident, or mistake precludes presentation of a meritorious claim or defense. (cite omitted) The grounds upon which a bill of review can be obtained are narrow because the procedure conflicts with the fundamental policy that judgments must become final at some point. (cite omitted) Thus, a bill of review petitioner must ordinarily plead and prove (1) a meritorious defense to the cause of action alleged to support the judgment, (2) that the petitioner was prevented from making by the fraud, accident or wrongful act of his or her opponent, and (3) the petitioner was not negligent. (cite omitted)
>
> Fraud in relation to attacks on final judgments is either extrinsic or intrinsic. Only extrinsic fraud will support a bill of review.

Texas bill of review cases frequently deal with extrinsic fraud issues; and when due process is the basis for a bill of review, it is because the bill of review plaintiff was never served with notice of the underlying proceeding.

This Supreme Court addressed the constitutional deficiencies of the Texas bill of review procedure in *Peralta v. Heights Medical Ctr., Inc.*, 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988). A review of *Peralta*

plainly shows that a bill of review is not a procedural option for Chemject's request to enforce the provisions of the Settlement Agreement and Judgment that render them void. Furthermore, it is a violation of due process and equal protection to require Chemject and other unnamed class members to file a petition for bill, even if the procedure was available, *arguendo*, when (i) the trial court retained continuing (exclusive) jurisdiction, (ii) a bill of review procedure is more costly, onerous and time consuming, and (iii) other similarly situated parties and non-parties were not required to file a petition for bill of review to have their post-judgment motions heard.

Moreover, absent a showing of extrinsic fraud, a bill of review must be filed within four years of the date of the judgment which the proponent seeks to set aside. *See* Tex. Civ. Prac. & Rem.Code Ann. § 16.051; *Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Tex.1998). Thus, since the 4-year limitation period for filing a bill of review is tied to the date of the judgment, it is clear that a bill of review is not intended to be a procedure for post-judgment changes in circumstance that affect the validity of the judgment.

In summary, Chemject is not seeking any relief that would qualify for a bill of review. Chemject is not attacking the original Judgment; rather, it is seeking enforcement of the provisions of the Judgment that render it void pursuant to its own terms. Chemject is attack the validity of the orders of June 17 and September 23, 2004 because they violate the terms of the Judgment and Settlement Agreement. This cannot be the basis of a bill of review because it is not an attack on a "judgment", as

required for a bill of review. Chemject is also not pursuing any extrinsic fraud claim in this appeal.[8] Therefore, none of Chemject's claims that are the subject of this appeal are a legitimate basis for a bill of review. Clearly, any petition for bill of review that Chemject might have filed to enforce paragraph 11 of the Judgment and section III.N. of the Settlement Agreement, would have been futile. Under similar circumstances, this Court has held that an available "due process" procedure need not be pursued if it would be futile or inadequate. See *Smith v. Robinson,* 468 U.S. 992, 1014, n. 17, 104 S.Ct. 3457, 3469, 82 L.Ed.2d 746 (1984) (citing cases).

CONCLUSION

For the foregoing reasons, the holding below contravenes this Court's precedents, under which unnamed class members are entitled to due process and equal protection. *See Phillips Petroleum Co. v. Shutts*; *Ortiz v. Fibreboard Corp*; *Mathews v. Eldridge*; *Hansberry v. Lee*; and *Devlin v. Scardelletti*, supra. Therefore, the petition for a writ of certiorari should be granted.

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[8] Chemject's extrinsic fraud claim relating to the original class action notice and judgment was the subject of a separate petition for bill of review, which was also disposed of and addressed in the Memorandum Opinion. (App. 3 at 11-24).

Respectfully submitted,

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December 27, 2007 * Counsel of Record

No. _____

In The

Supreme Court of the United States

CHEMJECT INTERNATIONAL, INC.,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, JOSE MIRELES AND PATRICIA GENUCHI,
Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals of Texas, Thirteenth District

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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COURT OF APPEALS
Thirteenth District
Corpus Christi - Edinburg, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth District of Texas, at Corpus Christi - Edinburg, as of the 25th day of January, 2007. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-04-567-CV (Tr.Ct.No. 98-07-3003-E)

CHEMJECT INTERNATIONAL, INC.,
Appellant,
v.
SOUTHWESTERN BELL TELEPHONE COMPANY, ET AL.,
Appellees.

On appeal to this Court from Cameron County, Texas.

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JUDGMENT

On appeal from the 357th District Court of Cameron County, Texas, from an order signed September 23, 2004. Memorandum Opinion by Justice Nelda V. Rodriguez.

THIS CAUSE was submitted to the Court on January 3, 2007, on the record and briefs. These having been examined and fully considered, it is the opinion of the Court that the appeal should be dismissed. Accordingly, the appeal is hereby DISMISSED.

Costs of the appeal are adjudged against appellant, CHEMJECT INTERNATIONAL, INC. It is further ordered that this decision be certified below for observance.

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CATHY WILBORN, CLERK

NUMBERS 13-04-567-CV AND 13-06-032-CV

COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI - EDINBURG

CHEMJECT INTERNATIONAL, INC., Appellant,
v.
SOUTHWESTERN BELL TELEPHONE COMPANY, ET AL., Appellees.

On appeal from the 357th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Garza, and Benavides
Memorandum Opinion by Justice Rodriguez

This case involves the settlement of a class action lawsuit brought against appellee Southwestern Bell Telephone Company (SWBT). In appellate cause number 13-04-567-CV, by six issues, appellant Chemject International, Inc. (Chemject), an unnamed class member, appeals from the trial court's granting of SWBT's plea to the jurisdiction and motion to strike Chemject's motion to intervene and from the trial court's order granting a joint motion to establish a settlement administration. In appellate cause number 13-06-032-CV, by nine issues, Chemject appeals from the trial court's granting summary judgments in favor of SWBT and Class Counsel and

denying Chemject's motion for new trial in a bill of review proceeding.[1] We dismiss cause number 13-04-567-CV and affirm the trial court's judgment in cause number 13-06-032-CV.

I. Background

A. General Background

The underlying suit (*Mireles* lawsuit) is a class action lawsuit filed on July 31, 1998, by class representatives, appellees Jose Mireles and Patricia Genuchi (the Class), against appellant SWBT for damages arising out of "municipal charges" paid by approximately five million SWBT residential and business customers in Texas.[2] In December 1999 a *cy pres* settlement (*Mireles* Settlement) was reached.[3] The trial court tentatively approved the settlement and approved the form and content of notice sent to class members advising them about the settlement, their right to opt out, or object and to appear at a fairness hearing. After receiving this notice, Chemject chose not to opt out of the class, not to object to the settlement, and not to appear at the fairness hearing. On May 22, 2000, after class certification and settlement fairness hearings on April 27 and May 4, 2000, the trial court certified the Class for settlement purposes and approved the settlement.[4]

R. Michael Northrup and Homer Max Wiesen, unnamed class members, challenged the propriety of the settlement by objecting to the settlement in the trial court and by appealing the judgment.[5] From these appeals this Court handed down two opinions, one on June 14, 2001, and the second on February 21, 2002. In *Northrup v. Southwestern Bell Tel. Co. (Northrup I)*, 72 S.W.3d 1 (Tex. App.-Corpus Christi

2001, no pet.) (op. on reh'g), we held "that in class action cases where the 'settlement class' device is used-i.e., where the class is certified simultaneously with or subsequent to the settlement of the class action-pre-settlement intervention is not required in order for an unnamed class member to have standing to appeal." *Id.* at 4-5. In *Northrup v. Southwestern Bell Tel. Co. (Northrup II)*, 72 S.W.3d 16 (Tex. App.-Corpus Christi 2002, pet. denied, in part, and dismissed, in part, as improvidently granted), this Court did not find the form of notice, by newspaper publication and by direct mail to SWBT customers as an insert in regular monthly telephone bills, to be defective. *Id.* at 19. Furthermore, we concluded that the trial court did not abuse its discretion in holding the *cy pres* distribution was fair, *id.* at 20, and affirmed the trial court's order approving the class action settlement. *Id.* at 22. The Texas Supreme Court issued its final order on February 6, 2004, and this Court's mandate issued on February 25, 2004.

B. Background Specific to Settlement Administration and Intervention Issues in Appellate Cause Number 13-04-567-CV

On March 24, 2003, after this Court's opinions were handed down in 2001 and 2002 but before its mandate issued in 2004, Chemject filed a petition in intervention and a motion to set aside the settlement agreement. It sought to have the settlement agreement and judgment declared void based on information discovered and events occurring during the appeal. On April 8, 2003, SWBT filed its plea to the jurisdiction and motion to strike Chemject's pleadings arguing that the trial court lacked jurisdiction to grant the relief requested.

On June 15, 2004, with the appellate process being complete, SWBT and the Class filed a joint motion to establish a settlement administration in accordance with the settlement agreement, an act they claimed was a ministerial act. On June 17, 2004, the trial court signed an order granting the joint motion. On July 19, 2004, Chemject filed an emergency motion to reconsider and vacate the June 17 order asserting that because the terms of the agreement, as well as circumstances and events occurring since the judgment was signed on May 4, 2000, the trial court's signing of the order was more than merely a ministerial act. On September 17, 2004, SWBT filed a motion for an order clarifying the June 17 order. On September 23, 2004, the trial court signed an order granting SWBT's plea to the jurisdiction and motion to strike and striking Chemject's petition in intervention, and on September 24, 2004, the trial court entered an order clarifying its order establishing settlement administration.

On October 22, 2004, Chemject appealed from the following orders: (1) the June 17 and September 23, 2004 orders establishing a settlement administration; and (2) the September 23, 2004 order granting SWBT's plea to the jurisdiction and motion to strike Chemject's petition in intervention.

C. Background Specific to Bill of Review in Appellate Cause Number 13-06-032-CV

On May 3, 2004, before the trial court ruled on its petition in intervention, Chemject filed a petition for bill of review as a class action on behalf of approximately 5 million SWBT customers, challenging the *Mireles* settlement. Seeking to have

the judgment declared void, Chemject alleged in its bill of review that false representations were made to the trial court and in the class action settlement notices which prevented Chemject and the Class from pursuing meritorious claims against SWBT.[6] In October 2004, Class Counsel and SWBT filed motions for summary judgment on Chemject's bill of review, arguing, among other things, that Chemject failed to adduce sufficient evidence to prove the elements for a bill of review, including extrinsic fraud. On November 29, 2004, the trial court denied with prejudice Chemject's bill of review and granted summary judgment for SWBT. The trial court denied with prejudice Chemject's petition for a bill of review and granted summary judgment for Class Counsel on March 21, 2005, declaring that "this summary judgment is a final judgment, and concludes this case." On May 19, 2005, the trial court entered an order denying Chemject's motion for a new trial that it had filed on April 19, 2005, and striking the exhibit attached to Chemject's motion.[7] Chemject appealed from the orders denying its bill of review and granting summary judgments and from the order striking the exhibit to the motion for new trial.[8]

II. Chemject's Petition in Intervention Appellate Cause Number 13-04-567-CV

By six issues, Chemject generally asserts that the trial court had the duty, authority, and jurisdiction to act in this matter, that the settlement agreement and judgment are void, and that the order establishing administration substituted the recipient of proceeds under a class action settlement and was, therefore, not a ministerial act but an impermissible modification of the judgment.

A. Plenary Jurisdiction

By its first and third issues, Chemject asserts that the trial court had the duty, authority, and jurisdiction to rule on the merits of its petition in intervention and its motion to have the class action settlement and agreed judgment declared void because of changed circumstances. We disagree.

As a general proposition, "[a] non-party may . . . successfully intervene post-judgment provided that both the plea is filed and the judgment is set aside within thirty days from judgment." *Malone v. Hampton*, 182 S.W.3d 465, 468 (Tex. App.-Dallas 2006, no pet.) (citing *In re Barrett*, 149 S.W.3d 275, 279 (Tex. App.-Tyler 2004, orig. proceeding). "Furthermore, a plea in intervention comes too late if filed after judgment and may not be considered unless and until the judgment has been set aside." *Texans United Educ. Fund v. Texaco, Inc.*, 858 S.W.2d 38, 40-41 (Tex. App.-Houston [14th Dist.] 1993, writ denied); *see First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex. 1984) (per curiam) (orig. proceeding) (citing *Comal County Rural High School Dist. No. 705 v. Nelson*, 158 Tex. 546, 314 S.W.2d 956 (1958)). More importantly, however,

> [a]ny document, other than a motion to enforce or clarify, filed after the expiration of the trial court's plenary jurisdiction, would be a nullity as a suit ends when the trial court's plenary power over the proceeding ends. The very purpose of limiting a trial court's plenary power over a proceeding is to foreclose the possibility of suit continuing indefinitely even through a final judgment has been obtained.

Malone, 182 S.W.3d at 470. Likewise, "[j]udicial action taken after the expiration of the court's jurisdiction is a nullity, and any orders signed outside the court's plenary jurisdiction are void." *Id.* at 468 (citing *State ex rel. Latty v. Owens*, 907 S.W.2d 484, 485-86 (Tex. 1996)); *see In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998) (per curiam) (orig. proceeding).

The trial court's May 2000 order and judgment approving the settlement was the final judgment in this case. Chemject's plea in intervention was filed on March 24, 2003, well after the thirty day extension of plenary power that is allowed under rule 329b. *See* Tex. R. Civ. P. 329b(c), (d) & (e) (providing trial court's plenary power is thirty days or up to 105 days with appropriately filed motions). Even had the trial court's plenary power been extended to 105 days, it would have expired in early September 2000. Chemject's filings after the trial court's plenary power expired had no legal effect and were a nullity. *See In re Dickason*, 987 S.W.2d at 571; *Malone*, 182 S.W.3d at 468. The trial court, therefore, had no duty, no authority, and no jurisdiction to rule on Chemject's plea in intervention and its motion to void the settlement agreement and the agreed judgment. Additionally, any orders signed outside the trail court's plenary jurisdiction were void. *See In re Dickason*, 987 S.W.2d at 571; *Malone*, 182 S.W.3d at 468.

B. Appeal Without Intervention

Chemject also appears to be arguing that, as an unnamed class member, it did not need to intervene in order to appeal. In *Northrup I*, we held that in class action cases where the class is certified simultaneously with or subsequent to the settlement

of the class action, pre-settlement intervention is not required in order for an unnamed class member to have standing to appeal. *Northrup I*, 72 S.W.3d at 4-5, 14. However, even assuming without determining that Chemject could have appealed without intervening below, this argument fails.[9]

Texas Rule of Appellate Procedure 26.1(a)(2) provides that the notice of appeal must be filed within thirty days after the judgment is signed, except, among other things, it must be filed within ninety days after the judgment is signed if a motion to modify is timely filed. Tex. R. App. P. 26.1(a)(2); *see id.* at rule 26.1(d) (setting out that if any party timely files a notice of appeal, another party may file a notice within an applicable period stated above or fourteen days after the first filed notice of appeal, whichever is later). The final judgment approving the settlement was entered on May 4, 2000, with a nunc pro tunc order entered on May 22, 2000. Chemject did not participate in the *Northrup* appeals. Its appeal from the final judgment was not timely. We overrule Chemject's first and third issues.

C. Due Process

In its second issue, Chemject generally contends, without supporting authority, that the striking of its petition in intervention would constitute a due process violation. *See* Tex. R. App. P. 38.1(h) (setting out that contentions are to be supported by clear and concise arguments with appropriate citations to authorities and to the record). However, Chemject filed a separate bill of review proceeding. We address the appeal of that proceeding below. Chemject has not explained why the bill of review does not satisfy

its due process needs. Thus, this argument is not persuasive, and we overrule Chemject's second issue.

Because of the disposition of the first three issues, we need not address Chemject's remaining issues in this appeal, cause number 13-04-567-CV. *See* Tex. R. App. P. 47.1.

III. Bill of Review Proceeding Appellate Cause Number 13-06-032-CV

Having concluded that the trial court's plenary power had expired, Chemject's challenges to the settlement agreement could only be raised in a bill of review. *See Coleman v. Sitel Corp.*, 21 S.W.3d 411, 413 (Tex. App.-San Antonio 2000, no pet.) (*citing* Tex. R. Civ. P. 329b(f); *Plains Growers, Inc. v. Jordan*, 519 S.W.2d 633, 636-37 (Tex.1974); *Ex parte Balazik*, 631 S.W.2d 198, 199 (Tex. App.-Fort Worth 1982, orig. proceeding)). In Chemject's bill of review proceeding, summary judgments were granted in favor of SWBT and Class Counsel, and this appeal, cause number 13-06-0032-CV, ensued.

By nine issues, Chemject contends the trial court erred in granting summary judgment because (1) SWBT and Class Counsel failed to show that no genuine issue of material fact exists and that they were entitled to judgment as a matter of law, (2) Chemject brought forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to the challenged element of the claims, (3) due process and equal protection rights were violated, and (4) the trial court abused its discretion when it denied Chemject's motion for new trial without an evidentiary hearing and struck Wiesen's deposition testimony and attached documents.

A. Standard of Review

When a trial court's order granting summary judgment does not state the grounds upon which it was granted, the judgment must be affirmed if any of the grounds advanced in the summary judgment motion are meritorious.[10] *Branton v. Wood*, 100 S.W.3d 645, 647 (Tex. App.-Corpus Christi 2003, no pet.) (citing *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989)); *Boren v. Bullen*, 972 S.W.2d 863, 865 (Tex. App.-Corpus Christi 1998, no pet.). Because the propriety of a summary judgment is a question of law, we review the granting of a traditional motion for summary judgment de novo. *Branton*, 100 S.W.3d at 646 (citing *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994)); *Tex. Commerce Bank Rio Grande Valley v. Correa*, 28 S.W.3d 723, 726 (Tex. App.-Corpus Christi 2000, pet. denied)). To prevail on a traditional motion for summary judgment, the moving party has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam). Only when the movant meets this burden does the burden shift to the nonmovant to raise a genuine issue of material fact. *See M.D. Anderson Hosp. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). In determining whether there is a genuine issue of material fact, evidence favorable to the nonmovant is taken as true, and all reasonable inferences and doubts are resolved in favor of the nonmovant. *Branton*, 100 S.W.3d at 646. A traditional summary judgment is proper if the movant conclusively disproves at least one element of each of the

plaintiff's causes of action or conclusively establishes each element of an affirmative defense to each of the plaintiff's claims. *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997) (per curiam); *Cathey*, 900 S.W.2d at 341. The non-movant has no burden to respond to a traditional motion for summary judgment unless the movant conclusively establishes its cause of action or defense. *Willrich*, 28 S.W.3d at 23.

B. Extrinsic Fraud

In its first two issues, Chemject contends that extrinsic fraud existed to support its bill of review. We disagree.

1. The Law

To prevail on a bill of review, Chemject must "allege and prove: (1) a meritorious defense to the cause of action alleged to support the judgment, (2) which [it] was prevented from making by the fraud, accident or wrongful act of the opposing party, (3) unmixed with any fault or negligence of [its] own." *Baker v. Goldsmith*, 582 S.W.2d 404, 405-07 (Tex. 1979); *Mowbray v. Avery*, 76 S.W.3d 663, 682 (Tex. App.-Corpus Christi 2003, pet. denied). In addition to the foregoing requirements, "[o]nly extrinsic fraud will support a bill of review." *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 752 (Tex. 2003); *see Tice v. City of Pasadena*, 767 S.W.2d 700, 702 (Tex. 1989).

Extrinsic fraud "is fraud that denied a party the opportunity to fully litigate at trial all the rights or defenses that could have been asserted." *King Ranch*, 118 S.W.3d at 752. "Extrinsic fraud is collateral fraud in the sense that it must be 'collateral' to the matter actually tried and not something which was actually or potentially in issue in the trial." *Temple v.*

Atchambo, 161 S.W.3d 217, 224 (Tex. App.-Corpus Christi 2005, no pet.) (citing *Montgomery v. Kennedy*, 669 S.W.2d 309, 312 (Tex. 1984)); *see Manley v. Parsons*, 112 S.W.3d 335, 337-38 (Tex. App.-Corpus Christi 2003, pet. denied).

Intrinsic fraud, on the other hand, is any fraud relating to "the merits of the issues that were presented and presumably were or should have been settled in the former action." *King Ranch*, 118 S.W.3d at 752 ("Issues underlying the judgment attacked by a bill of review are intrinsic and thus have no probative value on the fraud necessary to [support] a bill of review."). Intrinsic fraud is "inherent in the matter considered and determined before the trial court where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were, or could have been litigated therein." *Temple*, 161 S.W.3d at 224 (quoting *Montgomery*, 669 S.W.2d at 313). Intrinsic fraud encompasses concealed testimony, perjured testimony, fraudulent instruments, "or any other matter which was actually presented to and considered by the trial court in rendering the judgment assailed." *King Ranch*, 118 S.W.3d at 752 (providing that the underlying issues resolved by a judgment are considered intrinsic); *Tice*, 767 S.W.2d at 702; *McIntyre v. Wilson*, 50 S.W.3d 674, 680 (Tex. App.-Dallas 2001, pet. denied) (setting out that concealing evidence and presenting false evidence constitute intrinsic fraud).

2. Notice

Chemject first argues that there is evidence of extrinsic fraud because SWBT and Class Counsel allegedly made intentional, material and affirmative misrepresentations in the settlement notice sent to Chemject and the Class. Chemject specifically complains of the following alleged misrepresentations in the notice:

> SWBT does not keep any of the municipal fees it collects - all of the money goes to the municipalities;
>
> Class Counsel has conducted sufficient discovery so as to investigate the facts and applicable law regarding the matters in the Lawsuit;
>
> More importantly, discovery in the Lawsuit revealed that it would be extraordinarily difficult, if not impossible, to identify the specific amounts that individual Settlement Class members might recover even if the Lawsuit were successful;
>
> In addition, Class Counsel has determined that the amounts that might be recovered in individual Settlement Class members would be quickly consumed by the overall notice and administration costs necessary to facilitate settlement, because the Settlement Class is exceptionally large (it is estimated at more than five million members), and because the amount of possible recovery varies greatly but generally is not a large sum of money; and
>
> Discovery determined that SWBT cannot independently identify which Class Members

> suffered what damages. The administrative costs associated with trying to identify and then confirm individual recoveries on a case-by-case basis would exhaust any recovery.

(Emphasis in original.) Chemject further asserts that because these allegedly false statements were contained in a notice approved and agreed to by SWBT, sent by SWBT to class members in their regular SWBT phone bill, and are only confirmable from the records in the sole possession SWBT, SWBT is guilty of extrinsic fraud perpetrated on each member of the class. Chemject also argues that because SWBT, the *Mireles* plaintiffs, and their respective counsel made these false statements to the district court by including them in the notice approved by the court and affirmed the statements at oral hearings and in pleadings, these false statements are a fraud on the court.

We note that the trial court and this Court approved the notice about which Chemject now complains. Following a fairness hearing the trial court approved the notice.[11] Thus, the notice matter was presented to and considered by the trial court in rendering the judgment assailed. *See King Ranch*, 118 S.W.3d at 752. Additionally, Northrup challenged settlement issues on appeal, including issues related to the adequacy of the notice to the class members, the calculation of attorney fees, the fairness of the settlement, the designation of *cy pres* beneficiaries, and the adequacy of representation. *See Northrup II*, 72 S.W.3d at 19-21. And this Court approved the class notice in *Northrup II*. *See id.* The fraud now alleged by Chemject relates to the merits of the issues presented; the same notice issues presumably settled in the former action. *See King Ranch*, 118 S.W.3d at

752. We conclude, therefore, that the alleged misrepresentations in the notice asserted by Chemject are intrinsic in nature. They have no probative value on the fraud necessary to support a bill of review. *Id.*

3. Alleged Fraudulent Representations by Class Counsel

Chemject also contends that Class Counsel made various misrepresentations to the members of the Class about the discovery conducted during the *Mireles* suit, the nature and history of the case, and the benefits of the *Mireles* Settlement. However, even if these allegations were true, they cannot support a bill of review as a matter of law. The purported fraud must be undertaken by the opposing party, and Chemject, by this argument, is not complaining of actions of the opposing party. Rather it is complaining of actions of counsel for the class of which Chemject is an unnamed member. *See Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996, 1001 (Tex. 1950) (defining extrinsic fraud as "[a] wrongful act committed by *the other party to the suit* which . . . prevented the losing party either from knowing about his rights or defenses, or from having a fair opportunity of presenting them upon the trial") (emphasis added)). Alleged fraud by a party's own attorney is not sufficient to support a bill of review. *King Ranch*, 118 S.W.3d at 745; *Transworld Fin. Servs. v. Briscoe*, 722 S.W.2d 407, 408 (Tex. 1987) (explaining that extrinsic fraud is a wrongful act committed by "the other party to the suit" and holding that "a bill of review petitioner who alleges that he suffered an adverse judgment because of the fraudulent or wrongful acts of his attorney is not excused from the necessity of pleading and proving

extrinsic fraud on the part of his opponent"); *Gracey v. West*, 422 S.W.2d 913, 916 (Tex. 1968). Similarly, negligence, lack of diligence by Class Counsel, or allegations related to Class Counsel's valuation of the claims prior to settlement are insufficient as a matter of law to support a bill of review. *See, e.g., Borgerding v. Griffin*, 716 S.W.2d 694, 699 (Tex. App.-Corpus Christi 1986, no writ) (improper valuation of marital assets would not support a bill of review).

4. Alleged Fraudulent Representations by SWBT Counsel

Chemject also alleges that SWBT's counsel "knew that SWBT's database containing customer records goes back years, because SWBT's lead counsel had been involved in prior class actions when SWBT's secret databases were discovered"; that SWBT's attorneys presented witnesses "such as Ms. Lotridge and Mr. Torres, when they knew that their testimony was false or materially incomplete"; and that SWBT's attorneys "withheld critical documents." However, in *Northrup II* we held the following:

> The record from the fairness hearing conducted in this case indicates that the trial court based its approval of the settlement on consideration of the appropriate factors. . . . [E]vidence was introduced showing that because of the way SWBT's records were kept, determining the exact amount of damages for each individual plaintiff would be time-consuming and excessively difficult. Moreover, the amount that would likely be owed to each plaintiff would have been very small-*i.e.*, around one dollar. Dean Sherman, from Tulane University School of Law, appeared at the hearing and

offered his expert opinion testimony that the settlement was fair.

Northrup II, 72. S.W.3d at 21. The issues regarding SWBT's counsel that Chemject now wants to re-open and re-litigate go to the merits of the settlement's fairness. Thus, Chemject's allegations constitute intrinsic fraud. Fraud that is "inherent in the matter considered and determined before the trial court where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were, or could have been litigated therein." *Temple*, 161 S.W.3d at 224 (internal quotations omitted).

Issues one and two are overruled. Therefore, reviewing the granting of the rulings on the motions for summary judgment de novo, *see Branton*, 100 S.W.3d at 646, we conclude that SWBT and Class Counsel have established that there is no genuine issue of material fact regarding the element of extrinsic fraud and that they are entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Cathey*, 900 S.W.2d at 341.

C. Motion for New Trial

By three issues, Chemject challenges the trial court's denial of its motion for new trial. Chemject first contends, in its ninth issue, that the trial court erred in striking Wiesen's deposition with exhibits that was attached to its motion for new trial.

On March 21, 2005, final judgment was entered in this bill of review proceeding. On April 4, 2005, pursuant to rule 202.1, the 362nd District Court of Denton Count, Texas, granted Chemject's petition for Wiesen's deposition before suit. *See* Tex. R. Civ. P. 202.1 (providing that a person may petition the court

for an order authorizing the taking of a deposition to perpetuate testimony for use in an anticipated suit or to investigate a potential claim or suit). Neither SWBT nor Class Counsel received service of the petition or notice of the hearing on the petition. Wiesen's deposition by written questions was taken with notice only to Wiesen. Chemject informed the trial court that, pursuant to rule 202, it had sought the evidence "anticipating the possibility of a claim against the [class] plaintiff's counsel." On appeal, Chemject asserts that it only sought Wiesen's deposition to investigate a claim or suit, not in anticipation of a suit; thus, no notice to interested parties was required as SWBT urged. *See id.* at rule 202.3(a).[12] Chemject, however, offered the evidence obtained from Wiesen's deposition, not as part of an investigation or even in anticipation of a new lawsuit, but in support of its motion for new trial filed on April 22, 2005, in the existing lawsuit.

Wiesen's deposition was taken after final judgment had been entered and without notice to other parties in the lawsuit. It was then attached as evidence in support of Chemject's motion for new trial. Rule 202, which allows for depositions in certain instances with notice only to the deponent, is not applicable in this case. *See id.* at rule 202.1(b) & 202.3(a); *see also id.* cmt. 2 ("The bill of discovery procedure, which Rule 202 incorporates, is equitable in nature, and a court must not permit it to be used inequitably."). The trial court did not abuse its discretion, *see City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995) (providing that the admission and exclusion of evidence is committed to the trial court's sound discretion), but rather properly struck Wiesen's deposition by written questions with

exhibits because the alleged new evidence resulted from the rule 202 deposition. Issue nine is overruled.

Having concluded that the trial court properly excluded Wiesen's deposition with exhibits, there was no newly-discovered evidence to support Chemject's motion for new trial. Thus, the trial court did not abuse its discretion in denying the motion. *See Dir., State Employees Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994) ("In reviewing a trial court's ruling on a motion for new trial, the standard is abuse of discretion."). Issues seven and eight which address the trial court's denial of Chemject's motion for new trial based on newly-discovered evidence and its refusal to hold an evidentiary hearing are also overruled.

D. Due Process and Equal Protection

Finally, in its sixth issue Chemject brings the following due process and equal protection challenges:

Are [Chemject's] and the Mireles class member's constitutional due process and equal protection rights violated, if under Texas law:

(1) the false statements in the settlement notice, or false statements made to the court, are not considered extrinsic fraud for purposes of maintaining a bill of review action;

(2) Appellant's Amicus Curiae filings with the Texas Supreme Court are a *res judicata* bar to Appellant's bill of review claims; and/or

(3) a petition for bill of review cannot be maintained as a class action as a matter of law?

(Emphasis in original.) Chemject argues that if it "is not allowed to pursue its petition for bill of review, despite the substantial evidence it has presented, [Chemject] and the class will be left without a legal remedy for the loss of their legal rights that were fraudulently compromised and released in *Mireles*," and "[s]ince the Notice did not afford the class the opportunity to present their objections, or opt out, it failed to comply with due process." Chemject also asserts that "[i]n *Mireles*, there is no legitimate state interest in denying [Chemject] the ability to pursue its petition for bill of review, individually or as a class action, and [Chemject] and the class would be denied equal protection should that occur."

Chemject, however, has raised these constitutional issues for the first time on appeal; therefore, they are waived. *City of San Antonio v. Schautteet*, 706 S.W.2d 103, 104 (Tex. 1986) (per curiam) ("Even constitutional challenges not expressly presented to the trial court by written motion, answer or other response to a motion for summary judgment will not be considered on appeal as grounds for reversal."); *Birdo v. Ament*, 814 S.W.2d 808, 811 (Tex. App.-Waco 1991, writ denied) (concluding that even constitutional errors, such as due process complaints, are waived if not raised first in the trial court); *see Wood v. Wood*, 159 Tex. 350, 320 S.W.2d 807, 813 (Tex. 1959); *Walker v. Employees Ret. Sys.*, 753 S.W.2d 796, 798 (Tex. App.-Austin 1988, writ denied).

Relying on *Bunton v. Bentley*, 153 S.W.3d 50 (Tex. 2004) (per curiam), Chemject asserts that it can raise constitutional issues for the first time on appeal. In *Bunton*, the supreme court concluded that Bunton's claim that exemplary damages were excessive in light

of the actual harm could be raised for the first time on appeal to the supreme court. *Id.* at 53. The court determined that it could be raised at that time because the claim arose only after the court of appeals reduced the compensatory award and exemplary damages had to bear a reasonable relation to the defendant's conduct and to the actual harm suffered. *Id.*

In the present appeal, absence of extrinsic fraud was a ground presented by SWBT and Class Counsel as a basis for granting the motions for summary judgment. We affirmed on that basis rather than res judicata or the appropriateness of a class maintaining a bill of review action. *See Branton*, 100 S.W.3d at 647 (explaining that when a summary judgment does not state the grounds upon which it was granted, the judgment must be affirmed if any of the grounds advanced in the summary judgment motion are meritorious). Chemject has not explained how its constitutional claims arose from or how they bear a relationship to this determination. *See* Tex. R. App. P. 38.1(h) (providing contentions must be supported by clear and concise arguments with appropriate citations to authorities and to the record). Chemject's constitutional issues could have been presented to the trial court in Chemject's response to the motions for summary judgment. The constitutional issues it attempts to raise on appeal did not arise only after our affirmation of the summary judgment on the basis of no extrinsic fraud. *Bunton*, therefore, provides no authority for this issue.

Citing *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam), Chemject also argues that it would not be in the public interest-fundamental error-to deprive an entire class of 5 million citizens a

remedy in a case where there has been fraud in the class action notice and on the court, "especially considering that the purpose for giving class members notice of a class action settlement is to fulfill constitutional due process requirements." *Pirtle* provides that "[f]undamental error survives today in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas." *Id.* Nonetheless, based on our analysis of the issues presented in this appeal from the denial of a bill of review challenging an underlying class action lawsuit, this argument is not persuasive. *See Briscoe*, 722 S.W.2d at 407 ("The grounds upon which a bill of review can be obtained are narrow because the procedure conflicts with the fundamental policy that judgments must become final at some point."); *Montgomery*, 669 S.W.2d at 312 (stating bills of review are scrutinized "with extreme jealousy and the grounds on which interference [with a final judgment] will be allowed are narrow and restricted"). Chemject's sixth issue is overruled. [13]

IV. CONCLUSION

Accordingly, we dismiss appellate cause number 13-04-567-CV and affirm the trial court's judgment in appellate cause number 13-06-032-CV.

NELDA V. RODRIGUEZ
Justice

Memorandum delivered and filed
this 25th day of January, 2007.

1. Because the appeals are based on the same procedural facts and related arguments, we dispose of them in one opinion.

2. "A 'municipal charge' is a fee that SWBT was charged by municipalities for use of public rights-of-way. SWBT passed this charge on to its customers in their bills." *Northrup v. Southwestern Bell Tel. Co. (Northrup I)*, 72 S.W.3d 1, 2 n.2 (Tex. App.-Corpus Christi 2002, no pet.) (op. on reh'g).

3. "The *cy pres* doctrine has been used to disburse proceeds of a class action lawsuit when the amounts owing to each individual plaintiff are exceedingly small and/or identification of the amount due each individual would be excessively difficult." *Northrup v. Southwestern Bell Tel. Co. (Northrup II)*, 72 S.W.3d 16, 22 (Tex. App.-Corpus Christi 2003, pet. denied) (citing Susan Beth Farmer, *More Lessons Learned from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 Ford. L. Rev. 361, 393 (1999)). The agreed settlement required SWBT to pay $10 million into a settlement fund, with $3 million in cash and $7 million in same-as-cash service credits.

4. On May 4, 2000, a final judgment was entered approving the settlement. A nunc pro tunc order was entered on May 22, 2000, correcting a clerical error.

5. In *Northrup II*, this court determined that Wiesen failed to show he was a member of the class and was, therefore, without standing to prosecute the appeal. *Northrup II*, 72 S.W.3d at 19-20.

6. Chemject sued SWBT and Class Counsel, Michael P. Lynn, P.C.; Jeffrey M. Tillotson, P.C.; Michael R. Cowen; John T. Cox III; and Lynn

Tillotson & Pinker, LLP., in the underlying bill of review class action.

7. Exhibit A consisted of Wiesen's written deposition with twelve attachments.

8. We also note that two appeals, including the present one, were filed from the trial court's denial of the bill of review and grant of the summary judgment motions. The notice of appeal filed on December 28, 2004, from the order granting summary judgment in favor of SWBT was interlocutory in nature and was dismissed for want of jurisdiction. *See Chemject Intl Inc. v. Southwestern Bell Tel. Co.*, No. 13-04-684-CV, 2006 Tex. App. LEXIS 677, at *1 (Tex. App.-Corpus Christi, Jan. 26, 2006, no pet.) (per curiam).

Additionally, Chemject's notice of appeal also identifies the trial court's June 9, 2005 order denying its motion to abate, or in the alternative, motion for continuance. However, on appeal, Chemject sets out that it is only appealing from the orders granting the motions for summary judgment and the order denying its motion for new trial. *See* Appellant's Brief at ix-x and Appendix No.1.

9. This argument would apply only to an appeal from the final judgment and not to an appeal from the later orders in this case which we have determined are void. *In re Dickason*, 987 S.W.2d 570, 571 (per curiam) (orig. proceeding).

10. On appeal, it is urged that SWBT and Class Counsel conclusively negated one element of Chemject's bill of review, that being extrinsic fraud. This is a traditional summary judgment argument. Because we agree and because the trial court did not specify the grounds it relied on, we will set out the

standard of review applicable only to the traditional motion for summary judgment.

11. Additionally, Southwestern Tariff Analyst (STA), a purported class member, attempted to intervene and object to the *Mireles* Settlement. Representing STA were Marc Hill and Thomas Bray, two of Chemject's attorneys in the present proceeding. STA participated in the final fairness hearing of the *Mireles* suit, questioning witnesses, presenting its own expert testimony, and challenging the terms of the *Mireles* Settlement. Mirroring the same objections Chemject now asserts, STA objected tothe *Mireles* Settlement because: (1) STA estimated that the value of the claims to exceed the settlement amount; (2) STA believed that Class Counsel failed to identify illegitimate fees that SWBT charged to the consumer; (3) STA believed that Class Counsel misstated the amount of illegal charges that SWBT had passed on to consumers, and that the representation by Class Counsel that such charges were "nominal" was incorrect; and (4) STA believed that individual damages were, contrary to Class Counsel's representation, capable of accurate and expeditious calculation. STA dropped its objection to the *Mireles* Settlement as part of an agreement whereby the Plaintiff Class and SWBT narrowed the scope of the release, which allowed STA to pursue a separate class action against SWBT on behalf of SWBT business customers. STA did not otherwise opt out of the Settlement Class. Therefore, STA was bound by the final judgment entered by the trial court. The agreement between STA, the Class and SWBT was read into the record at the final fairness hearing.

12. Rule 202.3(a) provides the following:

> At least 15 days before the date of the hearing on the petition, the petitioner must serve the petition and a notice of the hearing--in accordance with Rule 21a-on all persons petitioner seeks to depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit.
>
> Tex. R. Civ. P. 202.3(a).

13. Because of our disposition of this appeal on the basis of the absence of extrinsic fraud, we need not address the remaining sub-issues in Chemject's sixth issue or issues three through five which involve arguments related to res judicata and the appropriateness of a class action appeal from a bill of review ruling. *See* Tex. R. App. P. 47.1.

NO. 98-07-3003-E

JOSE MIRELES, ET AL.	§	IN THE DISTRICT COURT
Plaintiffs,	§	
	§	
vs.	§	CAMERON COUNTY TEXAS
	§	
SOUTHWESTERN BELL	§	
TELEPHONE COMPANY,	§	
Defendant.	§	357TH JUDICIAL DISTRICT

ORDER GRANTING MOTION TO STRIKE

Let it be known that on 23rd day of September, 2004, the Court after considering Defendant Southwestern Bell Telephone Company's Plea to the Jurisdiction and Motion to Strike, has hereby GRANTED same and is of the opinion that this court does not have jurisdiction.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT Defendant Southwestern Bell Telephone Company's Plea to the Jurisdiction and Motion to Strike is granted and Chemject's Petition in Intervention is stricken.

SIGNED this 23rd Day of September, 2004.

/s Leonel Alejandro
Presiding Judge

COPIES TO ALL COUNSEL: 9/28/04
FILED 4:00 P.M.
SEPTEMBER 24, 2004
DISTRICT COURT OF
CAMERON COUNTY, TEXAS

NO. 98-07-3003-E

JOSE MIRELES, ET AL.	§	IN THE DISTRICT COURT
Plaintiffs,	§	
	§	
vs.	§	CAMERON COUNTY TEXAS
	§	
SOUTHWESTERN BELL	§	
TELEPHONE COMPANY,	§	
Defendant.	§	357TH JUDICIAL DISTRICT

ORDER TO CLARIFY THE ORDER ESTABLISHING SETTLEMENT ADMINISTRATION

It appears to the Court that some clarification of the Court's Order Establishing Settlement Administration is appropriate. Accordingly, the Court hereby acknowledges that the Texas Equal Justice Programs stated at the Fairness Hearing on May 4, 2000 as follows:

> "We would ask that the Court find from the Bench that one of the Projects eligible for funding from the settlement proceeds is the Technology Advancement Proposal of the Equal Justice Programs, which has been filed of record in this case, and that the Court find that:
>
> - the Court recognizes the importance of technology in expanding civil justice programs and agrees,
> - that such programs should be provided priority funding, consideration, and award of the grants and service credits resulting

from the service credits resulting from the settlement proceeds.

THE COURT: I will make those findings"

Sec Record of Fairness Hearing, May 4, 2000, at page 3.

The Court has noted the above record and reviewed the Texas Education Agency's Request for Applications concerning Collaborative Community Network Enhancement Grants, 29 Tex. Reg. 9031 (Sept. 17, 2004). The Court further finds that it is not the Court's intent to impose any particular cap on grants or service credit amounts.

IT IS SO ORDERED:

s/ Leonel Alejandro
Presiding Judge

Signed: September 23, 2004

COPIES TO ALL COUNSEL: 9/28/04

FILED 4:00 P.M.
SEPTEMBER 24, 2004
DISTRICT COURT OF
CAMERON COUNTY, TEXAS

NO. 98-07-3003-E

JOSE MIRELES, ET AL.	§	IN THE DISTRICT COURT
Plaintiffs,	§	
	§	
vs.	§	CAMERON COUNTY TEXAS
	§	
SOUTHWESTERN BELL	§	
TELEPHONE COMPANY,	§	
Defendant.	§	357TH JUDICIAL DISTRICT

ORDER GRANTING JOINT MOTION TO ESTABLISH SETTLEMENT ADMINISTRATION

TO THE HONORABLE JUDGE OF SAID COURT:

The Court GRANTS the Joint Motion to Establish Settlement Administration.

IT IS, THEREFORE, ORDERED that the following persons are appointed as settlement administrator and settlement representative:

Settlement Administrator:
Mr. Eddie Cavazos
1108 Lavaca, Suite 300
Austin, Texas 78701
(512) 457-8845

SWBT Settlement Representative:
Mr. James Shelgren
Regional V.P. - GEM
Southwestern Bell Telephone
712 E. Huntland Drive
Austin, Texas 78752

Should the need arise to appoint successor administrators and representatives, those individuals will be appointed in accordance with the terms of the Settlement Agreement. In the event appointing a successor(s) should become necessary, the parties are ordered notify the Court of the identity of such individual(s).

The settlement administrator and Southwestern Bell Telephone Company are ordered to administer and carry out the terms of the settlement agreement, in the manner set out in the Joint Motion to Establish Settlement Administration.

SIGNED this 17th day of June 2004.

s/ Leonel Alejandro
Judge Presiding

COPIES TO ALL COUNSEL: 6/18/04

FILED 4:00 P.M.
JUNE 17, 2004
DISTRICT COURT OF
CAMERON COUNTY,
TEXAS

NO. 98-07-3003-E

JOSE MIRELES, ET AL.	§	IN THE DISTRICT COURT
Plaintiffs,	§	
	§	
vs.	§	CAMERON COUNTY TEXAS
	§	
SOUTHWESTERN BELL	§	
TELEPHONE COMPANY,	§	
Defendant.	§	357TH JUDICIAL DISTRICT

ORDER AND FINAL JUDGMENT NUNC PRO TUNC

On this day, on its own Motion, the Court has decided to enter an Order and Final Judgment Nunc Pro Tunc to correct certain clerical errors contained in an Order and Final Judgment the Court executed on May 4, 2000. The Court inadvertently executed two different forms of Final Judgment One form correctly set forth the Court's judgment (the "Correct Judgment"), while the other form did not (the "Incorrect Judgment"). Specifically, the Incorrect Judgment contains the following clerical errors:

1) The last sentence of the first paragraph on page 1 of the Incorrect Judgment states that a hearing on the proposed settlement "was held on April 27, 2000." What the Court actually stated was that the hearing "was commenced" on April 27, 2000, as the hearing was not completed on April 27, but was carried over and completed on May 4, 2000.

2) Also on page 1, the last sentence of the first paragraph references only a preliminary order entered on December 16, 1999. It fails to mention the

Supplemental Order, entered on January 5, 2000, which is contained in the Correct Judgment.

3) On page 3, in numbered paragraph 3, the Incorrect Judgment has blanks after the words "January" and "February" in the first sentence. The Correct Judgment lists the appropriate dates as "January 27, 2000" and "January 31, 2000."

4) Paragraph 4 on page 3 in the Incorrect Judgment begins: "The best notice practicable . , . ," while the same paragraph in the Correct Judgment begins "The total cost of both forms of notice . . ." In fact, the Incorrect Judgment omits entirely the Court's finding with respect to the costs of notice and SWBT's right to offset this cost against the total value of service credits contained in the Settlement Agreement. As a result, the rest of the numbered paragraphs in the, Incorrect Judgment are incorrectly numbered.

5) In Paragraph 6 of the Incorrect Judgment, there are two sentences following the sentence that states; "Accordingly, the Court directs that the settlement be consummated in accordance with the terms and conditions of the Settlement Agreement." Those sentences should not be included in the Judgment. In the Correct Judgment, the proper language, which accurately reflects the Court's ruling on May 4, 2000, is found in paragraph 7.

6) Paragraph 13 of the Incorrect Judgment states: "Counsel for Plaintiffs are directed to serve a copy of this Order on the parties and objectors by first class mail." What the Court actually ordered is the following: "Counsel for Plaintiffs are directed to serve a copy of this Order on the parties and on any objectors who appeared at the hearing held on April

27 and who did not withdraw their objection by first class mail."

The Court finds as a matter of law that all of these errors are clerical rather than judicial. To the extent any are judicial, however, the Court finds that it maintains jurisdiction to modify the Incorrect Judgment. Accordingly, the Incorrect Judgment is hereby vacated, and the following Order and Judgment Nunc Pro Tunc is entered as of May 4, 2000:

This matter is before the Court on the motion of Plaintiffs Jose Mireles and Patricia Genuchi, both individually and on behalf of the Settlement Class previously certified herein for preliminary settlement approval purposes (the "Settlement Class"), and Defendant Southwestern Bell Telephone Company (hereinafter referred to as "SWBT"), for final approval of the proposed settlement as set forth in the Class Action Settlement Agreement dated December 15, 1999, and filed with the Court on December 16, 1999, (the "Settlement Agreement"). A hearing on the proposed settlement was commenced on April 27. 2000, pursuant to this Court's Order Granting Preliminary Approval of the Settlement, entered on December 16, 1999 ("Order Granting Preliminary Approval of Settlement") and its Supplemental Order, entered on January 5, 2000.

Notice of the April 27, 2000, hearing was given in accordance with the Order Granting Preliminary Approval of Settlement. The parties appeared by their respective attorneys of record. The Court heard and considered evidence in support of and in opposition to the proposed settlement set forth in the Settlement Agreement. The attorneys for the parties

and for the objectors were heard. An opportunity to be heard was given to all other persons requesting to be heard in accordance with the Order Granting Preliminary Approval of Settlement.

The Court has determined that the notice given to the members of the Settlement Class fully and accurately informed all members of the Settlement Class of all material elements of the proposed settlement; was the best notice practicable under the circumstances; was valid., due and sufficient notice to all Settlement Class members; and complied fully with Texas Rule of Civil Procedure 42, the United States Constitution, the Texas Constitution and any other applicable law, The entire matter of the proposed settlement having been heard and considered by the Court,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has jurisdiction over all claims of all Settlement Class members as asserted in Plaintiffs' Third Amended Petition (the "Action") and the Settlement Agreement; likewise, this Court has jurisdiction over all members of the Settlement Class. The Settlement Class is defined as:

> All persons and entities who currently reside in the State of Texas who subscribe, or formerly subscribed, to telephone service provided by SWBT and pay, or paid, to SWBT a municipal fee imposed pursuant to a municipal ordinance, other than an ordinance based upon a percentage of gross receipts, and collected pursuant to tariff or statute.

Excluded from the Class are (a) SWBT, and the directors and officers thereof, (b) the subsidiaries, parents, and affiliates of SWBT, and the directors and officers thereof; (c) any person or entity in which any excluded person has a controlling interest; (d) members of the immediate family of any of the foregoing, if a natural person; (e) the members, employees, and agents of the 357th Judicial District Court of Cameron County, Texas, including any trial or presiding judge; and (f) the legal representatives, heirs, successors-in-interest, and assigns of any excluded person.

2. Commencing on January 21, 2000, and continuing through February 19, 2000, copies of the Notice of Conditional Class Certification, Proposed Settlement and Hearing were mailed to certain members of the Settlement Class, specifically all current customers of SWBT in Texas, in accordance with the Order Granting Preliminary Approval of Settlement.

3. On January 27, 2000 and January 31, 2000, the Notice of Conditional Class Certification, Proposed Settlement and Hearing was published in the Dallas Morning News, the Houston Chronicle, the Austin American-Statesman, the Lubbock Avalanche Journal, the San Antonio Express News, the El Paso Times, the Corpus Christi Caller Times, and the Brownsville Herald in accordance with the Order Granting Preliminary Approval of Settlement.

C.

4. The total cost of both forms of notice was $397,553.04, which the Court finds to be reasonable. SWBT shall be entitled to offset this amount against

the total value of service credits in accordance with the terms of the Settlement Agreement.

5. The best notice practicable under the circumstances having been provided to the Settlement Class members and full opportunity having been offered to members of the Settlement Class to participate in this hearing, it is hereby determined that all members of the Settlement Class who have not timely elected to be excluded from the Settlement Class are bound by this Order and Final Judgment,

6. The Court finds that the numerosity, typicality, commonality and adequacy requirements of Texas Rule of Civil Procedure 42 are satisfied, and that in accordance with Rule 42(b)(4), common issues of fact and law predominate and make certification of the Settlement Class fair, efficient and appropriate. Therefore, pursuant to Texas Rule of Civil Procedure 42, the Court certifies the Settlement Class for purposes of final approval of the settlement.

7. Pursuant to Texas Rule of Civil Procedure 42, and based on its review of the entire record and all of the evidence before it, the Court hereby grants final approval to the Settlement Agreement and finds that it is, in all respects, fair, reasonable, adequate and in the best interests of the Settlement Class. The objections which were filed, timely or otherwise, have been carefully considered and are all overruled. Accordingly, the Court directs that the settlement be consummated in accordance with the terms and conditions of the Settlement Agreement.

8. Settlement Class Plaintiffs and all members of the Settlement Class who did not file timely notices of exclusion, either directly, representatively,

derivatively, or in any other capacity, are barred and permanently enjoined from the prosecution against SWBT (in any local, state or federal court, agency or other authority or forum, in any state of the United States) of any end all claims, demands, causes of action of every kind and nature, for any alleged obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, that were or could have been asserted or sought in the Action, relating in any way to SWBT's pass-through, collection, accumulation, handling, custody, control, distribution or use of municipal fees in Texas up to the date of Final Approval as defined in the Settlement Agreement. A list of the class members who properly and timely excluded themselves from the Settlement Class shall be filed jointly by counsel for the Plaintiffs, and the Settlement Class and counsel for SWBT in the Office of the District Clerk within thirty (30) days of this Order and Final Judgment.

9. This Action and all claims and causes of action asserted herein are dismissed with prejudice.

10. Each party shall bear its own litigation expenses and court costs subject to the settlement terms concerning attorneys' fees and costs.

11. In the event that the settlement does not become Final in accordance with the terms of the Settlement Agreement, then this Order and Final Judgment shall be rendered null and void and be vacated.

12. Without affecting the finality of this Order and Final Judgment and until the Satisfaction of Judgment is filed, the Court shall retain continuing jurisdiction over this case and the parties, including

all members of the Settlement Class; the administration and enforcement of the settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction and interpretation of the Settlement Agreement.

13. The Court grants the application for Attorneys' Fees and Expenses submitted by counsel for Plaintiffs and the Settlement Class.

14. Counsel for Plaintiffs are directed to serve a copy of this Order on the parties and on any objectors who appeared at the hearing held on April 27, 2000 and who did not withdraw their objection by first class mail.

DATED: SO ORDERED:

May 22, 2000 s/ Fernando Mancias
Presiding District Judge

NO. 98-07-3003-E

JOSE MIRELES, ET AL.	§	IN THE DISTRICT COURT
Plaintiffs,	§	
	§	
vs.	§	CAMERON COUNTY TEXAS
	§	
SOUTHWESTERN BELL	§	
TELEPHONE COMPANY,	§	
Defendant.	§	357TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Court concludes that it has jurisdiction over all claims of all the members of the settlement class ("Settlement Class"), as asserted in Plaintiffs' Third Amended Petition (the Action"). Likewise, this Court has jurisdiction over the Settlement Class.

2. The Court finds that the Settlement Class is so numerous that joinder of all members is impracticable. In this connection, the Court finds that the Settlement Class includes at least 5 million members located in various municipalities all over the State of Texas.

3. There are several common issues of law and fact in the Action. One legal issue is whether Southwestern Bell Telephone Company ("SWBT") was entitled to collect municipal fees from its subscribers in Texas municipalities that have municipal fee ordinances pursuant to which municipalities are compensated on a basis other than a percentage of SWBT's gross-receipts. One example of such an ordinance at issue is a specified annual

payment ("SAP") ordinance. Another example is a fee-per-line ordinance ("FPL").

4. The particular class representatives' claims are typical of the Settlement Class' claims. Indeed, the claims of the Settlement Class are identical as it relates to the common legal issue described in paragraph 3.

5. The Court finds that the named ciass representatives. Jose Mireles and Patricia Genuchi. ably performed their representative roles. They did not receive any favorable treatment under the Settlement Agreement. had no conflicts with the other members of the Settlement Class, and they fairly and adequately represented and protected the rights and interests of the Settlement Class.

6. Thus, the Court concludes that the numerosity, typicality, commonality, and adequacy requirements of Texas Rule of Civil Procedure 42(a) fully are satisfied.

7. Further, in accordance with Rule 42(b)(4), the Court concludes that common issues of fact and law predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The Court finds the following matters to be pertinent, and has considered each of them in reaching this conclusion: (A) Among other things. because the sum of money at issue for individual class members is small -- especially considering the strength of SWBT's defenses - - and any recovery would be much smaller than and probably would not justify the transactional costs involved in pursuing such claims individually, the Court finds and concludes that the interest of

members of the Settlement Class in individually controlling the prosecution of a separate action, if any, is very small; (B) there was no evidence that any litigation of this type already had been commenced by any members of the Settlement Class prior to this Action; (C) because of the transactional costs that would be involved in pursuing individual actions across the State of Texas, it is desirable to concentrate the litigation in one forum. This forum is appropriate inasmuch as this Court fully is aware of and is capable of performing its duties in connection with this Action; and (D) the settlement avoids many of the difficulties that would be presented in trying this Action. The Court concludes that it could manage the difficulties presented in a trial of this action based upon what the Court knows at this point.

8. Therefore, the Court concludes that the requirements of Texas Rule of Civil Procedure 42(b) have been satisfied. The Court finds and concludes that the Settlement Class should be certified for purposes of final approval of the Settlement Agreement.

9. The Court finds that, after it preliminarily determined that a class action could be maintained in this Action in its Order Granting Preliminary Approval of Settlement, notice was given to the Settlement Class in accordance and compliance with such order. The Court concludes that such notice was the best notice practicable under the circumstances. The Court finds that the notice included individual notice to all members of the Settlement Class who could be identified through reasonable effort. Indeed. notice was given not only to subscribers who live in Texas municipalities in which SAP and FPL

ordinances ever were in effect, but went to all current SWBT subscribers -- whether or not they live or operate in a municipality, and regardless of the type of ordinances in effect in such municipalities.

10. The Court finds that the notice fairly and accurately advised each member of the Settlement Class: (A) of the nature of the suit; (B) that the Court would exclude him or her from the class if he or she requested to be excluded by a specified date; (C) that the judgment would bind all members of the Settlement Class who did not request exclusion by that specified date; and (D) that any member not requesting exclusion could enter an appearance through counsel or otherwise object to the settlement. The Court concludes that the notice was valid. due and sufficient notice to all Settlement Class members, and complied fully with all of the requirements of Texas Rule of Civil Procedure 42(c)(2), the United States Constitution, the Texas Constitution, and all other applicable laws.

11. The Court finds that the parties appeared at the fairness hearing both individually and by their respective attorneys of record, along with counsel for one of the objectors. The Court heard and considered evidence in support of and in opposition to the proposed settlement set forth in the Settlement Agreement. While not all of the objectors appeared at the fairness hearing, the Court finds and concludes that a full and fair opportunity to be heard was given to all persons requesting to be heard in accordance with the Order Granting Preliminary Approval of Settlement.

12. Further, the Court finds that all of the written objections and other papers that were filed with the

Court, timely or otherwise, were carefully considered by the Court. The Court considered all such objections -- whether the objectors making such objections appeared at the fairness hearing or not. The Court concludes that none of the objections are meritorious, and they should all be overruled.

13. The Court finds that SWBT had numerous, substantial defenses to the merits of the Action. Some of the defenses, if successful, would have been dispositive of the case, meaning that the members of the Settlement Class would have received no recovery.

14. The Court finds that the amount and nature of the discovery taken by class counsel was reasonable under the circumstances. The Court finds that the merits of the Action, in large part, turned on legal issues, and the essential facts were not hotly contested.

15. The Court finds that, under the totality of the circumstances, the total consideration in the Settlement Agreement is adequate. Further, the Court concludes that the cy pres nature of the settlement is fair, appropriate, adequate, and the best way to compensate the Settlement Class under the circumstances. In this connection, the Court finds that it would be extraordinarily difficult, if not impossible, to identify many of the specific members of the Settlement Class. Additionally, the Court finds that, even if individual members were identified, the administrative costs in verifying the amounts that such members had paid to SWBT would almost certainly exceed any individual recovery. Further, the Court finds that the amounts that might be recovered by individual class members if the Action were

successful is literally too small individually to justify the administrative expense of distributing litigation recoveries to each class member according to his or her own loss. Finally, the Court concludes that disbursing the settlement funds to and by means of the Telecommunications Infrastructure Board ("TIFB") is a fair, appropriate, and adequate way to compensate the Settlement Class. Indeed, under the circumstances, the payment to TIFB is the best way to provide compensation to the Settlement Class.

16. The Court finds that counsel for the members of the Settlement Class have recommended that the Court approve the Settlement Agreement. The Court finds that class counsel collectively have sufficient involvement, competency, and experience in class litigation to merit this Court giving some weight to their recommendation. Accordingly, the Court finds that it should, and it has, given appropriate weight to such recommendation.

17. The Court finds that, absent a settlement, the future expenses in prosecuting the Action would be substantial. In light of the real possibility that the Settlement Class would receive nothing if the Action were litigated, the transactional costs could well exceed any potential recovery. The Action had been litigated for approximately a year and a half at the time of the settlement, which the Court finds was a sufficient time for class counsel to evaluate the merits of the Action. Considering the totality of the circumstances, including the appellate process for certification decisions, the Action reasonably could be expected to take a great deal more time, perhaps years, to conclude. In this light, the consideration obtained in the Settlement Agreement is not "clearly

inadequate." Instead, as stated above, the Court finds the consideration to be adequate, and clearly in the best interest of the Settlement Class.

18. The Court finds that a neutral party, the Office of Public Utility Counsel ("OPUC"), not only did not object to the settlement, but congratulated the parties on reaching a settlement. The Court finds that OPUC was interested in the merits of this Action inasmuch as it had earlier intervened in the Action. As a result, the Court finds that OPUC had sufficient interest in the merits of this Action such that its statements regarding the settlement merit some weight. The Court concludes that it has given such statement its appropriate weight.

19. The Court finds that the number of objectors is small in light of the huge number of members in the Settlement Class. The Court finds that the objections that were presented to the Court are insubstantial in both number and nature.

20. The Court finds that the Settlement Agreement is the result of good faith, honest, arms-length negotiations. It is clear that the Action was hotly contested; there was no collusion among counsel for the Settlement Class and counsel for SWBT.

21. The Court finds that, in response to the notice to the Settlement Class. Some members of the Settlement Class excluded themselves from the Settlement. The Court concludes that the Settlement Class members that excluded themselves are, in fact, excluded and not bound by the Order and Final Judgment Nunc Pro Tunc.

22. The Court finds and concludes that the Settlement Class Plaintiffs and all members of the

Settlement Class who did not tile timely notices of exclusion, either directly, representatively, derivatively, or in any other capacity, are barred and permanently enjoined from the prosecution against SWBT (in any local, state or federal court, agency or other authority or forum. in any state of the United States) of any and all claims, demands, causes of action of every kind and nature. for any alleged obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, that were or could have been asserted or sought in the Action, relating in any way to SWBT's pass-through, collection, accumulation, handling, custody, control, distribution or use of municipal fees in Texas up to the date of Final Approval as defined in the Settlement Agreement.

23. Pursuant to Texas Rule of Civil Procedure 42, applicable case law, and based on its review of the entire record and all of the evidence before it, the Court hereby concludes that the Settlement Agreement is, (1) in all respects, fair, adequate, and reasonable, (2) was the product of honest, arms-length, hotly-contested negotiations, and (3) is in the best interests of the Settlement Class.

DATED: JUNE 27, 2000

SO ORDERED:

s/ Fernando Mancias
Presiding Judge

7/5/2000 COPIES TO:
HON MICHAEL COWEN
HON RUBEN R PENA
MR MAX WEISEN
HON RICK GUZMAN
HON MANUEL VELA

FILED 4:00 P.M.
SEPTEMBER 24, 2004
DISTRICT COURT OF
CAMERON COUNTY,

HON MICHAEL NORTHRUP TEXAS

THE SUPREME COURT OF TEXAS

Orders Pronounced September 28, 2007

ORDERS ON PETITIONS FOR REVIEW

THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

07-0354 CHEMJECT INTERNATIONAL, INC. v. SOUTHWESTERN BELL TELEPHONE COMPANY, MICHAEL P. LYNN, P.C., JEFFREY M. TILLOTSON, P.C., MICHAEL R. COWEN, JOHN T. COX III AND LYNN TILLOTSON & PINKER, LLP; from Cameron County; 13th district

(13-06-00032-CV, ___ SW3d ___, 01-25-07)

OFFICIAL NOTICE FROM SUPREME COURT OF TEXAS

RE: Case No. 07-0355
COA #: 13-04-00567-CV
STYLE: CHEMJECT INTERNATIONAL, INC.
v. SOUTHWESTERN BELL TELEPHONE COMPANY, ET AL.

Today the Supreme Court of Texas granted the motion for extension of time to file petition for review under TEX. R. APP. P. 53.7(f) in the above referenced case. The petition for review is due to be filed no later than **5:00 p.m., May 30, 2007**.

OFFICIAL NOTICE
COURT OF APPEALS
13TH JUDICIAL DISTRICT

RE: 13-04-00567-CV
STYLE: CHEMJECT INTERNATIONAL, INC.
V. SOUTHWESTERN BELL TELEPHONE COMPANY, ET AL.

Appellant's motion for rehearing and motion for reconsideration en banc (2 motions in 1) in the above cause was OVERRULED by this Court on Thursday, March 15, 2007.

MANDATE

To the 357th District Court of Cameron County, GREETINGS:

Before our Court of Appeals for the Thirteenth District of Texas, on the 25th day of January, 2007, the cause upon appeal to revise or reverse your judgment between

CHEMJECT INTERNATIONAL, INC.,
Appellant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, ET AL., Appellees

Cause No. 13-04-00567-CV (Tr. Ct. No.98-07-3003-E)

was determine; and therein our said Court made its order in these words:

MINUTES
Vol/page
18/67

On appeal from the 357th District Court of Cameron County, Texas, from an order signed September 23, 2004. Memorandum Opinion by Justice Nelda V. Rodriguez.

THIS CAUSE was submitted to the Court on January 3, 2007, on the record and briefs. These having been examined and fully considered, it is the opinion of the Court that the appeal should be dismissed. Accordingly, the appeal is hereby DISMISSED.

Costs of the appeal are adjudged against appellant, CHEMJECT INTERNATIONAL, INC. It is further ordered that this decision be certified below for observance.

02/15/07	Appellant's motion for extension of time to file motion for rehearing –GRANTED to 02/16/07
03/15/07	Appellant's motion for rehearing – OVERRULED
03/15/07	Appellant's motion for reconsideration en banc – OVERRULED
05/03/07	Appellant's motion for extension of time to file petition for review – GRANTED to 05/30/07
09/28/07	Appellant's petition for review – DENIED

BILL OF COSTS

Clerk's Fees, Court of Appeals (Effective 09/01/97)

(Paid by Appellant)	$ 165.00
(Paid by Appellees)	20.00
Clerk's Record	785.00
1 ' Clerk's Record	32.00
2 ' Clerk's Record	100.00

Reporter's Record	272.45
TOTAL	$ 1,374.45

WHEREFORE, WE COMMAND YOU to observe the order of our said Court of Appeals for the Thirteenth District of Texas, in this behalf, and in all things have it duly recognized, obeyed and executed.

WITNESS, the Hon. Rogelio Valdez, Chief Justice of our Court of Appeals, with the seal thereof affixed, at the City of Corpus Christi, Texas, this the 28th day of November, 2007.

CECILE FOY GSANGER, CLERK

PROCLAMATION

BY THE

Governor of the State of Texas

TO ALL TO WHOM THESE PRESENTS SHALL COME:

House Bill 1, the General Appropriations Act, having been duly certified by the Comptroller of Public Accounts pursuant to Article III, Section 49a of the Texas Constitution, has been presented to me for action. The bill would appropriate an estimated $117.4 billion from all fund sources, including $58.2 billion from the General Revenue Fund for the fiscal biennium beginning September 1, 2003. General revenue spending would decrease by $2.6 billion or 4.3% compared to the current biennium.

This budget accomplishes what we set out to do. We kept the trust by keeping our promises. We told the citizens of Texas that...despite tough economic times...we would not raise the price of government to balance the budget. We delivered on that promise.

This bill meets the basic needs of Texans. Key provisions include:

- $1.2 billion in new funding for public education, including a new science initiative, the Governor's High School Completion and Success Initiative and the Early Start Initiative to foster strong early childhood learning. More than $580 million was provided for textbooks and instructional

materials.

- $1.1 billion in new funding for vital health care programs. This budget enhances accountability while maintaining eligibility under the Children's Health Insurance Program at 200 percent of poverty while providing increases for Medicaid acute care coverage, HIV medications and children with special health care needs. An additional $172 million is also provided to help trauma centers handle more emergency cases.

- Increased funding to the Texas Grant Program to assist in keeping access to higher education open to those students with the drive and determination to succeed in college.

- Funding for research carried out by public universities was significantly increased by allowing universities to retain 100% of their Indirect Cost Recovery for research purposes. Health-related institutions were also appropriated funds to increase their research into biotechnology initiatives.

- Seed money to generate billions in bond funds for the Texas Mobility Fund, an unprecedented commitment to building needed road, rail and public infrastructure projects.

- 295 million in new funding (appropriated through House Bill 7) for the Texas Enterprise Fund. These funds will assist the state's efforts to attract employers and create new jobs.

This budget also lays the groundwork to ensure Texas has the safe, abundant water supply it needs by moving forward with funding for plans to desalinate ocean water, and provides the funding necessary to bring the state's clean air plan into

federal compliance.

The legislature has done a commendable job in reducing the growth of state government, leaving me with little to veto in the state budget. However, as I discussed in my State of the State address, Texans have a need and a right to see and understand how their tax dollars are spent. The Texas state budget should have transparent items of appropriation. Continued reliance on outdated text and excess verbiage makes it more difficult than necessary to determine how money is used. I hope that legislative budget writers will work with me to separate administrative items of appropriation from direct service items of appropriation. Increasing the number of specific line items and decreasing lump sum appropriations would add precision and clarity to appropriations text so Texans can see what agencies are doing with our precious financial resources.

My item vetoes total $68.2 million in general revenue and $81.2 million from all funding sources. I hereby veto the following items from House Bill 1 and include a statement of my objections to each of those items.

Article I – General Government

Aircraft Pooling Board	2004	2005
All items of appropriation	~~$3,711,068~~	~~3,660,494~~

This veto action will eliminate the Aircraft Pooling Board. As I said in my State of the State address, this agency underutilizes valuable state assets and is no longer needed. Operations of the Pooling Board can be conducted by outsourcing to commercial carriers and using charter planes. In addition, maintenance functions can be transferred to the

Department of Public Safety through budget execution.

Article III – Education

Telecommunications Infrastructure Fund Board	2004	2005
All items of appropriation	~~$2,086,025~~	~~$0~~

This veto action will eliminate the Telecommunications Infrastructure Fund Board. The agency has not awarded grants since August 2002. Another entity will be needed to close out existing grants, but this will be done by Executive Order.

Higher Education Coordinating Board	2004	2005
C.1.1 Advanced Research Program	~~$9,500,000~~	~~UB~~

This veto action deletes an appropriation to the Advanced Research Program. The goal of increasing the amount of research which is carried out by the general academic

~~Any unexpended balances remaining as of August 31, 2004 are hereby appropriated to the agency in fiscal year 2005 for the same purposes.~~

This veto action deletes a contingency rider for a bill that was vetoed.

I have signed House Bill No. 1 together with this proclamation stating my objections to individual items of appropriation therein. In accordance with Article IV, Section 14 of the Texas Constitution, individual items of appropriation objected to shall be of no force or effect. The remaining portions of the bill shall be effective according to its terms.

Since the Legislature by its adjournment has prevented the return of this bill, I am filing this bill and these objections in the office of the Secretary of State and giving notice thereof by this public proclamation according to the aforementioned constitutional provision.

IN TESTIMONY WHEREOF, I have signed my name officially and caused the Seal of the State to be affixed hereto at Austin, this 22nd day of June, 2003.

Rick Perry
Governor of Texas

ATTESTED BY:
Gwyn Shea
Secretary of State
June 22, 2003
Austin, Texas

Executive Order RP27 - August 11, 2003

Relating to the close-out of the outstanding grants of the Telecommunications Infrastructure Fund.

BY THE
GOVERNOR OF THE STATE OF TEXAS
Executive Department
Austin, Texas
August 1, 2003

WHEREAS, the Telecommunications Infrastructure Fund Board was created by the 74th Session of the Texas Legislature to grant and manage funds to qualified entities for telecommunications infrastructure; and

WHEREAS, the last grants authorized by the Board of the Telecommunications Infrastructure Fund were issued in August 2002 and

WHEREAS, many of those grants have a term that will continue into Fiscal Year 2004; and

WHEREAS, the State of Texas General Appropriations bill for the 2004-2005 biennium as signed into law does not contain an appropriation to fund the operations of the Telecommunications Infrastructure Fund Board; and

WHEREAS, it is in the interest of the State of Texas that these grants be closed-out in a deliberate and timely fashion;

NOW, THEREFORE, I, Rick Perry, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas as the Chief Executive Officer, do hereby order the following:

1. *Transfer.* The grant management, reimbursement of expenses, and grant close-out functions, including final reconciliation and disposition of files and final archiving of the Telecommunications Infrastructure Fund Board (the "Board") are hereby assigned to the Texas Workforce Commission effective September 1, 2003.

2. *Functions.* The Texas Workforce Commission, on the effective date of this transfer and in accordance with this executive order, shall maintain contractual arrangements with grantees, provide technical assistance to grantees regarding the closure process, conduct audit resolutions, and reimburse grantees based on appropriate documentation and consistent with the grant documents and historical Telecommunications Infrastructure Fund Board policies and procedures.

3. *Assets.* All assets of the Board, to the extent practicable, are to be utilized by the Texas Workforce Commission to administer and close out active grants. At the appropriate time, the Texas Building and Procurement Commission will dispose of remaining assets.

4. *Fund Access.* Current access to the Uniform Statewide Accounting System by the Board shall continue for the period required to close out the Telecommunications Infrastructure Fund Board Grants. The Texas Workforce Commission is hereby authorized to make entries on behalf of the Board to

process transactions to administer and close out the existing Telecommunications Infrastructure Fund Board Grants.

5. *Reimbursement.* The Texas Workforce Commission may be reimbursed for actual costs and expenses related to administration and close out of the Telecommunications Infrastructure Fund Board Grants and any related audit resolution functions.

6. *Personnel.* Employees of the Board who are involved in grant administration and close-out on August 31, 2003, will become temporary full-time employees of the Texas Workforce Commission for the four month period beginning September 1, 2003, and ending December 31, 2003. The Texas Workforce Commission shall provide notice to the Office of the Governor by December 1, 2003 if any temporary employees are needed beyond December 31, 2003 to complete the grant closeouts.

7. *Timeline.* Active grant end dates scheduled for August 31, 2003, September 30, 2003 and March 31, 2004, will continue on that timeline, however, all final requests for funds and other documentation are required not later than 60 days after the grant end date to facilitate close-out.

8. *Notification.* The appropriate officials of the Board shall, as soon as practicable, notify grant recipients through Web posting, regular mail, and certified mail of interim and final close-out dates and procedures according to the aforementioned schedule.

9. *Status Reports.* On a monthly basis, the Texas Workforce Commission shall issue status reports to the Office of the Governor detailing fund status, dollars reimbursed to grantees, number of grants

closed, number of grants to be closed, and number of grant files appropriately submitted for archiving. On a monthly basis, the Texas Building and Procurement Commission shall issue status reports to the Office of the Governor detailing the facilities and equipment disposition status.

10. *Archive.* The Department of Information Resources and the Library and Archives Commission shall work with other entities as appropriate to ensure the availability of archived data for further use by the state.

This executive order supersedes all previous orders inconsistent with its terms and shall remain in effect and in full force until modified, amended, rescinded, or superseded by me or by a succeeding Governor.

Given under my hand this the 11th day of August, 2003.

RICK PERRY
Governor
ATTESTED BY:
GEOFFREY S. CONNOR
Acting Secretary of State

NO. 98-07-3003-E

JOSE MIRELES, ET AL.	§	IN THE DISTRICT COURT
	§	
Plaintiffs,	§	
	§	
vs.	§	CAMERON COUNTY TEXAS
	§	
	§	
SOUTHWESTERN BELL	§	
TELEPHONE COMPANY,	§	
	§	
Defendant.	§	357TH JUDICIAL DISTRICT

CLASS ACTION SETTLEMENT AGREEENT

Filed: 10:20 a.m.
December 16, 1999
District Court of Cameron
County, Texas

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TO
CLASS ACTION SETTLEMENT AGREEMENT

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EXHIBIT G — Form of Release for Plaintiffs

EXHIBIT H — Plan for Funding of Texas Internet Collaborative Community Networks

EXHIBIT I — Agreement for Return of Documents

EXHIBIT J — Certification of Compliance with Agreement for Return of Documents

This Class Action Settlement Agreement (the "Agreement") is made and entered into as of December 15, 1999, by and among: (I) Southwestern Bell Telephone Company ("SWBT"), on behalf of itself and its present and former parents, subsidiaries, affiliates, officers, directors, employees, attorneys, agents, representatives, predecessors, successors and assigns; and (2) Jose Mireles, and Patricia Genuchi, on behalf of their heirs, successors, and assigns ("Plaintiffs") and on behalf of a class of persons and entities known as the "Settlement Class" as defined below. SWBT, Plaintiffs, Plaintiffs' Counsel, and Settlement Class members may be referred to individually as a "Party" and collectively as the "Parties." The Agreement is intended by the Parties hereto to fully, finally, and forever resolve, discharge, and settle the Released Claims, as defined herein, upon and subject to the terms and conditions hereof.

I.
DEFINED TERMS

The terms in this Agreement shall be defined as follows:

Administrator. "Administrator" means the third-party administrator(s) who may be hired to handle all or part of the settlement administration.

Agreement. "Agreement" means this Class Action Settlement Agreement setting forth the settlement agreement between the Plaintiffs, the Settlement Class, and the Released Parties.

Court. "Court" means the 357th Judicial District Court of Cameron County, Texas.

Current Customers. "Current Customers" means all Texas residents who are customers of SWBT on the Effective Date.

Effective Date. "Effective Date" means the date on which the Court signs the Preliminary Order.

Final Approval. "Final Approval" means the date of occurrence of the last to occur of each of the following: (a) entry of an Order and Final Judgment substantially in the form attached hereto as Exhibit "E" finally approving this Agreement; and (b) either expiration of all direct appeal periods or the final affirmance of the Final Judgment by the highest court having jurisdiction of the appeal of such Final Judgment, or the final dismissal or denial of any and all appeals from the Final Judgment.

Final Judgment. "Final Judgment" means the Order and Final Judgment attached hereto as Exhibit "E."

Former Customers. "Former Customers" means members of the Settlement Class who are not current Customers on the Effective Date.

Lawsuit. The litigation filed by Plaintiffs on July 30, 1998, in the 357th Judicial District Court of Cameron County, Texas, as Cause No. 98-07-3003-E.

Maximum Fees and Expenses. "Maximum Fees and Expenses" means the fees and expenses sought by Plaintiffs' Counsel in an amount not to exceed two million dollars ($2,000,000).

Maximum Notice Cost Amount. "Maximum Notice Cost Amount" means the costs and expenses incurred in the mailing and publication of Notice in an amount not to exceed One Million Two Hundred and Fifty Thousand Dollars ($1,250,000).

Notice. "Notice" means the notice that will be provided in accordance with the Preliminary Order, including collectively the version to be included in telephone bills of SWBT customers (the "Mailed Notice"), attached hereto as Exhibit "C," and the notice to be published in the Dallas Morning News, the Houston Chronicle, the Austin American-Statesman, the Lubbock Avalanche Journal, the El Paso Times, the Corpus Christi Caller Times, the Brownsville Herald, and the San Antonio Express News (the "Published Notice"), attached hereto as Exhibit "D," for the purpose of informing members of the Settlement Class of the conditional certification of the Settlement Class and the terms of the settlement reflected in this Agreement.

Petition. "Petition" means Plaintiffs' Third Amended Petition filed herein on November, 1998 as Cause No. 98-07-3003-E.

Plaintiffs. "Plaintiffs" means Jose Mireles and Patricia Genuchi.

Plaintiffs' Counsel. "Plaintiffs' Counsel" means Michael R. Cowen of Cowen & Livesay and Jeffrey M. Tillotson, P.C., Michael P. Lynn, P.C., Thomas M. Melsheimer, P.C. and John T. Cox, III of Lynn Stodghill Melsheimer & Tillotson, L.L.P.

Preliminary Order. "Preliminary Order" means an Order entered by the Court, substantially in the form attached hereto as Exhibit "B," that preliminarily approves this Agreement, orders notification of the Settlement Class, enjoins further litigation, and sets the date for the Settlement Hearing.

Released Claims. "Released Claims" means any and claims, rights, causes of action, suits, matters, issues, controversies, or other bases for liability, whether known or unknown, that have been, could have been, or that might be asserted hereafter in the Lawsuit or in any other court or administrative or regulatory proceeding (including but not limited to any claims arising under federal or state law) by or on behalf of Plaintiffs or any members of the Settlement Class, whether individual, derivative, representative, legal, equitable or any other type or in any other capacity against the Released Parties which have arisen, arise now, or hereafter may arise out of or relate in any way to the pass-through or collection of municipal fees in Texas, including all causes of action that are or could be raised under Plaintiffs' pleadings on file herein or that consumers or customers could raise in relation to SWBT's pass-through of municipal fees under tariff as filed with the Public Utility Commission of Texas, under the Public Utility Regulatory Act (as amended from time to time), the Texas Utilities Code (as amended from time to time), or otherwise, in those cities having a "specified annual payment," "flat-fee" or "fee per line" ordinance, as is more particularly set forth in Exhibit "O" hereto.

Released Parties. "Released Parties" means SWBT and its present and former parents, subsidiaries, affiliates, officers, directors, employees, attorneys, agents, representatives, predecessors, successors and assigns.

Settlement Benefits Fund. "Settlement Benefits Fund" means the benefits SWBT will provide to the Settlement Class pursuant to this Agreement. The Settlement Benefits Fund shall not

exceed the sum total of Ten Million Dollars ($10,000,000) (the "Total Settlement Value"), and shall be provided as described in Sections 111.D.2-6.

Service Credits. "Service Credits" means credits for services to be provided by SWBT (or its affiliates, in SWBT's sole discretion)(the "Services") at applicable tariffed or generally available rates.

Settlement Class. "Settlement Class" means all persons and entities who currently reside in the State of Texas who subscribe, or formerly subscribed, to telephone service provided by SWBT, and pay, or paid, to SWBT a municipal fee imposed pursuant to a municipal ordinance, other than an ordinance based upon a percentage of gross receipts, and collected pursuant to tariff or statute.

Excluded from the Class are: (a) SWBT and the directors and officers thereof; (b) the subsidiaries, parents, and affiliates of SWBT, and the directors and officers thereof; (c) any person or entity in which any excluded person has controlling interest; (d) members of the immediate family of any of the foregoing, if a natural person; (e) the members, employees, and agents of the 357th Judicial District Court of Cameron County, Texas, including any trial or presiding judge; and (f) the legal representatives, heirs, successors-in-interest, and assigns of any excluded person.

Settlement Hearing. "Settlement Hearing" means a hearing before the Court to consider and determine whether this Agreement is fair, reasonable, and adequate, whether the Judgment should be entered, and to determine the amount of fees and expenses to be awarded to Plaintiffs' Counsel.

SWBT. "SWBT" means Southwestern Bell Telephone Company.

Texas Internet Collaborative Community Network Plan. "Texas Internet Collaborative Community Network Plan" means the Plan developed by the Texas Telecommunications Infrastructure Fund Board ("TIFB") to provide online Internet-based community information and resource networks for Texas communities and surrounding areas, as it is implemented under the authority of the TIFB. The Plan is generally described in Exhibit "H," attached hereto.

TIFB. "TIFB" means the Texas Telecommunications Infrastructure Fund Board.

II.
RECITALS

WHEREAS, Plaintiffs, on behalf of themselves and all others similarly situated, filed the Lawsuit against SWBT; and

WHEREAS, Plaintiffs allege in their Petition that, among other things, SWBT wrongfully charged or overcharged certain individuals and entities for municipal fees and further that such charges were not permitted by any tariff, written agreement or applicable law; and

WHEREAS, Plaintiffs maintain that they have valid claims against SWBT and a valid basis for class certification; and

WHEREAS, SWBT is a telecommunications company that provides and has provided local and long-distance telephone service in the State of Texas; and

WHEREAS, SWBT has denied the material allegations of the Petition; has denied and continues to deny any wrongdoing and any liability to Plaintiffs or any member of the Settlement Class, in any amount, in connection with the claims asserted in the Petition and contends that it would prevail in the Lawsuit; and

WHEREAS, Plaintiffs, through Plaintiffs' Counsel, have conducted and continue to conduct a thorough investigation and evaluation of the facts and law relating to the matters set forth in the Lawsuit, including, but not limited to, the review of numerous non-public documents produced by SWBT and depositions of SWBT employees knowledgeable about the matters herein; and

WHEREAS, Plaintiffs and SWBT have had full and ample opportunity to evaluate their respective positions on the merits of the Lawsuit and

WHEREAS, the issues before the Court are complex and, if fully litigated, will likely result in protracted litigation and appeals; and

WHEREAS, the Parties to the Lawsuit desire to avoid the additional cost, time, effort, and uncertainties that would result from the continuation of the Lawsuit, regardless of the outcome, and desire to enter into a settlement; and

WHEREAS, discovery in this case has indicated that it would virtually be impossible as well as prohibitively expensive to attempt to identify individual claimants and the amounts they might be owed if Plaintiffs were to prevail in the Lawsuit; and

WHEREAS, Plaintiffs and Counsel for Plaintiffs have concluded that this Agreement provides

substantial benefits to Plaintiffs and to the members of the Settlement Class, resolves the substantial issues of the Lawsuit without prolonged litigation and the risks and uncertainties involved in litigation, and provides the members of the Settlement Class with significant individual benefits as well as benefits in the aggregate, and have concluded that this Agreement is fair to and in the best interest of Plaintiffs and the Settlement Class; and

WHEREAS, although SWBT denies any wrongdoing and any liability whatsoever, SWBT believes that it is in its best interest to settle the Lawsuit on the terms set forth in this Agreement in order to avoid further expense and inconvenience;

WHEREAS, settlement of the Lawsuit at this stage will relieve the significant burden that otherwise will be imposed on the Court and the Parties; and

WHEREAS, the Parties reached agreement on all of the terms of this Agreement through extensive arms-length negotiations between Counsel for Plaintiffs and Counsel for SWBT; and

WHEREAS, Counsel for Plaintiffs and Counsel for SWBT believe that the terms set forth in this Agreement are fair, reasonable, and adequate.

NOW, THEREFORE, in consideration of these premises and the mutual covenants, promises, agreements, and obligations undertaken herein and other good and valuable consideration, the Parties agree as follows:

III.

TERMS AND CONDITIONS OF SETTLEMENT

A. Preliminary Nature of This Agreement.

1. This Agreement represents the Parties' preliminary agreement to settle the Lawsuit. The Agreement is subject to and conditioned upon: (i) the Parties' further negotiation and execution of any necessary settlement documents; (ii) reasonable confirmatory discovery between the Parties; and (iii) Preliminary and Final Judicial Approval of the Agreement.

2. In the event that any of the above events do not occur for any reason or Preliminary or Final Approval is not obtained for any reason, then: (i) this Agreement shall become null and void; (ii) the Parties shall be restored to their respective positions prior to the execution of this Agreement; (iii) the Parties hereby agree to jointly move the Court to vacate any and all orders entered pursuant to this Agreement; (iv) litigation of the Lawsuit shall continue; and (v) the settlement, this Agreement, and all negotiations related thereto shall be inadmissible in future proceedings.

B. Parties' Agreement to Proceed as a Class Action.

1. For purposes of this Agreement only, the Parties hereby agree that the Lawsuit may proceed as a class action pursuant to Tex. R. Civ. P. 42. In connection therewith, the Parties stipulate to the conditional certification of the Lawsuit as requested in Plaintiffs' Petition and stipulate to the certification of a class of individuals as defined in the Settlement Class.

2. For purposes of this Agreement only, the Parties further stipulate that Jose Mireles and Patricia Genuchi are adequate class representatives for the Settlement Class, as provided for by Tex. R.

Civ. P. 42(a)(4), and stipulate to their appointment as class representatives.

3. The Parties further stipulate to the designation of Jeffrey M. Tillotson, P.C., Michael P. Lynn, P.C., Thomas M. Melsheimer, P.C., John T. Cox III, Esq. and Michael R. Cowen, Esq., as Class Counsel for the Settlement Class for purposes of this Agreement, as provided for by Tex. R. Civ. P. 42.

C. Submission of Preliminary Order

Within three (3) days after the execution of this Agreement, the Parties shall submit this Agreement and the respective exhibits to the Court together with a Motion for Preliminary Approval of Proposed Class Action Settlement substantially in the form attached hereto as Exhibit "A." Plaintiffs shall request, and Defendants will not oppose, entry of the Preliminary Order in the form attached hereto as Exhibit "B." The Preliminary Order shall:

1. Preliminarily approve this Agreement;

2. Direct that Notice be provided to the Settlement Class in two forms: (1) the Mailed Notice in a form substantially similar to the notice attached as Exhibit "C," which will be mailed by SWBT to Settlement Class members who are Current Customers in SWBT's monthly billing envelope during one regular billing cycle; and (2) the Published Notice substantially in the form attached as Exhibit "D" to be published in the Dallas Morning News, the Houston Chronicle, the Austin American-Statesman, the Lubbock Avalanche Journal, the El Paso Times, the Corpus Christi Caller Tunes, the Brownsville Herald, and the San Antonio Express News, once a week for two consecutive weeks. SWBT shall make all reasonable efforts to send the Mailed Notice within

the billing cycle beginning on January 21, 2000. Both Mailed and Published Notice will advise customers of their right to opt-out of the settlement and will provide an address for recipients to apply in writing to opt-out. Both Mailed and Published Notice will specify a deadline for the return mailing of election by a member of the Settlement Class who wants to opt-out and advise that all Settlement Class members who want to opt-out must notify Plaintiff's counsel on or before the deadline for opt-outs. The deadline for opt-outs shall be April 1, 2000, provided Notice is mailed in the SWBT billing cycle beginning January 21, 2000. Otherwise, the deadline for opt-outs shall be forty-five (45) days after the last date on which the Notice is published or mailed. SWBT will notify the Court and Plaintiffs' Counsel when the process of sending and publishing the Notice has been completed. All expenses of the Notice shall be borne by SWBT, which shall be entitled to deduct such expenses from the Settlement Benefits Fund up to the Maximum Notice Cost Amount

Preliminarily bar and enjoin Plaintiffs and all members of the Settlement Class, or any of them, front commencing or prosecuting any actions asserting any of the Released Claims, either directly, representatively, derivatively or in any other capacity, against the Released Parties, pending the final determination of whether the Settlement provided for in this Agreement should be approved. The parties agree that a reasonable bond for this injunction is $500. The preliminary injunction shall be dissolved at the time of the Settlement Hearing.

3. Set the Settlement Hearing on or about April 10, 2000, and not later than sixty (60) days after the

last date on which the Notice may be mailed or published. The Settlement Hearing will be held to:

(a) review and determine the merits of any objections to the Settlement

(b) determine whether to approve the Agreement as fair, adequate and reasonable;

(c) authorize all further acts necessary to consummate and effectuate the terms and conditions of the Settlement;

(d) determine whether the Court should enter Final Judgment;

(e) make a final determination relating to the payment of attorneys' fees and expenses to Plaintiffs' Counsel;

(f) determine whether the Court should permanently bar and enjoin Plaintiffs and all members of the Settlement Class, or any of them, from commencing or prosecuting any actions asserting any of the Released Claims, either directly, representatively, derivatively or in any other capacity, against the Released Parties; and

(g) determine such other matters as the Court may deem necessary and appropriate.

D. Agreed Order and Final Judgment

1. Before the Settlement Hearing, the Parties shall submit to the Court an agreed Order and Final Judgment substantially in the form attached hereto as Exhibit "E," which shall provide for

(a) Approval of this Agreement and a finding that the Settlement proposed herein is, in all respects,

adequate and reasonable and in the best interests of the Settlement Class;

(b) A specific approval of the Texas Internet Collaborative Community Network Plan;

(c) Effectuation of this Agreement in accordance with the terms contained herein;

(d) A Settlement Class, as defined above, but with the additional exclusion of those persons who have submitted valid and timely requests for exclusion pursuant to the Notice sent to members of the Settlement Class;

(e) The dismissal with prejudice of the claims filed in the Lawsuit, as amended, and each and every Released Claim of each and every Settlement Class member and Plaintiff against each and all of the Released Parties; and

(f) The payment of attorneys' fees and expenses in such amount as the Court approves, with the total amount not to exceed the Maximum Fees and Expenses.

2. Upon Final Approval and in exchange for the consideration provided in this Agreement, SWBT will pay the sum of Ten Million Dollars ($10,000,000) into the Settlement Benefits Fund in the manner prescribed below:

(a) Three Million Dollars ($3,000,000) shall be paid in cash; and

(b) Seven Million Dollars ($7,000,000) shall be paid in Service Credits.

3. SWBT may offset the Service Credits portions of section 111.D.2.c above by any or all of the following:

(a) Notice costs incurred by SWBT pursuant to section III.E of this Agreement, up to a maximum amount of One Million Two Hundred and Fifty Thousand Dollars ($1,250,000).

(b) Costs incurred by SWBT for payment of the Administrator pursuant to paragraph III.E of this Agreement.

(c) Any attorneys' fee award paid by SWBT pursuant to paragraph 111.H of this Agreement up to the Maximum Fees and Expenses.

4. The Three Million Dollars ($3,000,000) cash component of the Settlement Benefits Fund shall be paid in its entirety to the TIFB in the form of two separate grants as follows:

(a) A grant to the TIFB in the amount of Two Million Dollars ($2,000,000) to be used or distributed by the TIFB for salaries of regional Web Librarians for the Texas Internet Collaborative Community Networks ("CCNs") for the two-year life of the program.

(b) A grant to the TIFB in the amount of up to One Million Dollars ($1,000,000) to be used or distributed by the TIFB for local advertising of websites or for training of users or Web Librarians for the CCNs.

5. SWBT shall provide the cash grants specified above in sections III.D.2.(a) and III.D.4(a)-(b) to the TIFB within ninety (90) days of Final Approval.

6. Upon Final Approval and in exchange for the consideration provided in this Agreement, SWBT will use all measures reasonably necessary to implement the Plan. SWBT shall begin the implementation of the Plan no less than ninety (90) days after the Final Approval. Within this ninety-day period, SWBT shall pay the cash portion of the Settlement Benefits Fund, as defined above. SWBT will notify the Court when the implementation of the Plan is completed.

7. Plaintiffs' counsel retains the right to conduct discovery sufficient to establish the accuracy and reasonableness of any amount SWBT seeks to include as an offset of the service credits portion of Section

8. The parties agree that all Settlement Benefit Funds paid under this Settlement Agreement shall not in any way modify, reduce, or mitigate SWBT's pre-existing obligations to TIFB, if any.

E. Costs of Notice and Administration

SWBT shall pay all Notice Costs associated with this Agreement as specified in paragraph III.C.2. herein. SWBT shall be responsible for the administration of the notice process, with oversight by Plaintiffs' counsel SWBT will have the sole option to choose and hire, at its expense, the Administrator. SWBT may deduct the Administrator's fees and expenses from the Settlement Benefits Fund.

Plaintiffs' counsel shall handle questions and any opt-out responses from putative class members, with oversight by SWBT. SWBT shall be responsible for the administration and funding of the Settlement Benefits Fund, with oversight by Plaintiffs' counsel.

F. Joint Press Statement

Plaintiffs' counsel and counsel for SWBT shall issue a joint press statement in the form of Exhibit "F" attached hereto, contemporaneously with the first published Notice. Thereafter, the joint press statement shall be provided in response to any press or media inquiry. If subsequent press or media inquiries are directed to counsel for either party, counsel shall so advise the counsel for opposing party, and provide an opportunity for the parties to deliver a joint response.

G. Discharge, Settlement and Release

1. The parties agree and intend that entry of Final Judgment in this proceeding shall effect the complete discharge, settlement and release of the Released Claims against the Released Parties. Immediately after the entry of Final Judgment, Plaintiffs, on behalf of themselves, their successors, heirs and assigns, and on behalf of the Settlement Class members, shall execute general releases in the form attached as Exhibit "G."

2. The Parties expressly acknowledge and agree that, by this Agreement, Plaintiffs and the Settlement Class forever release and discharge the Released Claims. It is understood and agreed that if SWBT provides the Settlement Benefits Fund in accordance with this Agreement and the Exhibits hereto, then neither Plaintiffs nor any member of the Settlement Class shall hereafter challenge, and they

shall be estopped from challenging, the pass-through by SWBT of municipal fees in Texas through the date of Final Judgment.

H. Attorneys' Fees

In connection with the Settlement, Plaintiffs' counsel will apply to the Court for an aggregate award of attorneys' fees and expenses. SWBT agrees that it will not oppose such application that conforms to the Maximum Fees and Expenses. SWBT agrees to pay such attorneys' fees and expenses as are awarded by the Court, up to an amount not to exceed the Maximum Fees and Expenses, which amount shall be deducted from the Settlement Benefits Fund. The Maximum Fees and Expenses shall include all fees and expenses awarded by the Court in connection with this settlement to any Settlement Class member or their counsel; the Released Parties and their attorneys, agents, predecessors, and affiliates shall not be liable for any further claims, costs, damages or attorneys' fees or any other matter of liability regarding the allegations forming the basis of the Lawsuit, and shall not be obligated to pay more than such amount. Subject to the terms and conditions of this Agreement, payment of such fees and expenses as may be awarded by the Court, up to the Maximum Fees and Expenses, shall be made within five (5) business days from the date of Final Approval.

I. Timely Objections to be Considered at Settlement Hearing

Any objections to the settlement contained in this Agreement or to any application for an award of attorneys' fees and expenses shall be heard and any papers submitted in support of said objections shall be received and considered by the Court at the

Settlement Hearing only on or before a date to be specified in the Notice, persons making objections shall file notice of their intention to appear (which shall set forth each objection and the basis therefor), with any papers in support of their position, and serve copies of all such materials upon a representative of Plaintiffs' Counsel and a representative of SWBT as set forth in Paragraph P.13 herein and the Notice.

J. Exclusion from the Class

Any member of the Settlement Class who has not properly and timely requested exclusion from the Settlement Class shall be bound by any and all judgments, settlements or releases entered or approved by the Court whether favorable or unfavorable to the Settlement Class.

K. SWBT's Power to Terminate

SWBT shall be entitled to terminate this Agreement in its sole discretion if any of the following occur: (a) at least 200,000 potential members of the Settlement Class timely elect to be excluded from the Settlement Class; (b) additional notice to the Settlement Class is required beyond that provided in this Agreement; (c) this Agreement cannot reasonably be expected to be completed in accordance with its terms; or (d) substantial delay, not contemplated by this Agreement, is reasonably anticipated prior to Final Approval (excluding delay caused by any appeal of this Settlement Agreement).

L. Expiration of SWBT's Agreement to Provide Benefits

All obligations of SWBT to provide benefits or to take other actions pursuant to this Agreement shall

cease not later than four years after Final Approval, whether or not the Service Credits portion of the Settlement Benefit Fund has been used. If any cash funds remain in the Settlement Benefit Fund at expiration of this Agreement, then such funds shall be provided as a contribution to the Texas Telecommunications Infrastructure Fund. If any Service Credits remain, then any entitlement to such Service Credits shall expire.

M. Return of Documents

Plaintiffs' Counsel agree that, no later than sixty (60) days after Final Approval (the "Document Return Date"); Plaintiffs' Counsel will return to SWBT or destroy all copies of documents provided or obtained during discovery (including confirmatory discovery), all summaries of SWBT documents examined during discovery, and all copies of interviews or testimony of SWBT witnesses prepared during discovery, all in accordance with the Agreement for Return of Documents, attached hereto as Exhibit "I." Plaintiffs' counsel agrees to file with the Court a certificate, in the form attached hereto as Exhibit "J," that such return or destruction has been accomplished. SWBT agrees to retain such documents as are returned to its possession by the Document Return Date for four (4) years and provide such copies to Plaintiffs' counsel as may be necessary to respond to an inquiry, claim or dispute raised by a member of the Settlement Class.

N. Effect of Termination, Cancellation or Substantial Modification

If this Agreement is terminated for any reason prior to Final Approval, or if any of the orders set out in the Exhibits to this Agreement are not entered

substantially as reflected in those Exhibits, or if the settlement contemplated by this Agreement is not concluded substantially as described in this Agreement with an order of the Court approving the settlement, the Agreement and all other acts taken to effect a proposed settlement will be void and of no effect and will not be admissible by or against any Party to this Agreement. The Parties will use their best efforts to obtain approval of this Agreement by the Court and to obtain conclusion of the Lawsuit that is now pending in accordance with the terms of the Agreement.

If Final Approval does not occur, or if this Agreement is terminated or canceled pursuant to its terms, Plaintiffs and SWBT shall be deemed to have reverted to their respective status as of the date and time immediately prior to the execution of this Agreement, and they shall proceed in all respects as if this Agreement and related orders had not been executed. In such event, the terms and provisions of this Agreement shall have no further force and effect with respect to Plaintiffs and the Released Parties and shall not be used in this or any other litigation or any other proceeding for any purpose, and any orders or judgment entered by the Court in accordance with the terms of this Agreement shall be treated as vacated, *nunc pro tunc*.

O. Confidentiality

Plaintiffs' counsel agrees to take reasonable efforts to keep confidential the terms and conditions of this Agreement except as is necessary to discharge their duties as Settlement Class counsel, represent the Settlement Class, and handle inquiries from opt-outs or their counsel. Plaintiffs' counsel agrees not to solicit publicity or publication in the press or other media regarding this matter, this Settlement, or the Agreement Plaintiffs' counsel agrees to respond to any press or media inquiries in accordance with. Paragraph "F" above. The parties agree that this provision is not intended to impair or violate Settlement Class counsels' duties or Plaintiffs' duties as Settlement Class representatives.

P. Miscellaneous Provisions

1. All aspects of this Agreement and the settlement contemplated by it shall be governed by and construed in accordance with Texas law, without regard to the application of conflict-of-law principles.

2. Plaintiffs and Plaintiffs' Counsel represent and warrant that none of the Plaintiffs' alleged claims or causes of action against the Released Parties have been assigned, encumbered or in any manner transferred in whole or in part

3. Except as otherwise provided in this Agreement, the Released Parties shall not be liable for any further claims, costs, damages, attorneys' fees or other thing of value regarding the settlement reflected in this Agreement, regardless of the response or lack thereof by members of the Settlement Class.

4. Upon Final Approval, this Agreement shall be binding upon and inure to the benefit of the Parties, the Settlement Class, and their respective agents, executors, heirs, successors and assigns. The Parties agree to do all things reasonably necessary to obtain Court approval promptly and to implement the Agreement if granted such approval.

5. Each and every clause in this Agreement, including those clauses beginning with the phrase "WHEREAS," and all Exhibits hereto are specifically incorporated as binding and enforceable parts of this Agreement.

6. All headings in this Agreement are included for ease of reference only and shall not alter, amend or have any effect on the interpretation of this Agreement.

7. The Parties jointly participated in the drafting of this Agreement. If its terms must be construed, no inferences can be made against any one Party by virtue of draftsmanship.

8. This Agreement and the exhibits attached hereto constitute the entire agreement among the Parties hereto and supersede and amend any and all prior negotiations, understandings, and agreements with respect to the settlement of the issues and actions set forth herein. No representations, warranties or inducements have been made to any Party concerning the Agreement or its exhibits other than the representations, warranties and covenants contained and memorialized in such documents. This Agreement may not be amended orally, and any amendment or modification thereof must be in writing duly executed by an authorized representative of the Party to be bound thereby.

Except as otherwise provided herein, each party shall bear its own costs.

9. This Agreement shall neither be used as evidence nor construed in any way whatsoever as an admission by any Party as to any issue of law or fact in the Lawsuit, or any other litigation.

10. Until such time as the Parties file a joint motion seeking preliminary approval of this Agreement, the terms and conditions shall remain confidential between the Parties and their counsel.

11. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

12. Should the settlement reflected in this Agreement, or any portion thereof, be challenged or alleged to create rights in non-members of the Settlement Class under federal or state regulatory law, SWBT shall have the option to toll implementation of this Agreement pending resolution of the issue. Should the settlement reflected in this Agreement, or any portion thereof, be found improper under federal or state regulatory law, or should SWBT be required to provide benefits materially different from those provided in this Agreement, SWBT shall be entitled to terminate this Agreement, or so much of it as is the subject of challenge, and negotiate settlement terms as to such terminated portion.

13. All notices, requests, demands, or other communications required, permitted, or desired to be given hereunder shall be deemed to have been duly given if delivered in writing by hand delivery or mailed by certified mail, addressed as follows:

For SWBT:

David Brown
Southwestern Bell Telephone Company
1616 Guadalupe, Room 600
Austin, Dallas, Texas 78701-1298

with copies to:

Robert Edwin Davis Hughes & Luce, L.L.P.
1717 Main Street, Suite 2800
Dallas, Texas 75201

For Plaintiffs and Settlement Class:

Jeffrey M. Tillotson, P.C.
Lynn Stodghill Melsheimer & Tillotson, L.L.P.
750 North St. Paul Street, Suite 1400
Dallas, Texas 75201

14. Plaintiffs' Counsel represent that they are authorized on behalf of Plaintiffs and the Settlement Class to take all appropriate action required or permitted to be taken pursuant to this Agreement to effectuate its terms and are also authorized to enter into any modifications or amendments to this Agreement on behalf of the Settlement Class that they deem appropriate.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed, by their duly authorized attorneys, as of the day and year first above written.

Respectfully submitted,

LYNN STODOHILL MELSHEIMER & TILLOTSON, L.L.P.
Jeffrey M. Tillotson, P.C.
State Bar No. 20039200

John T. Cox
State Bar No. 24003722
750 North St. Paul Street, Suite 1400
Dallas, Texas 75201
(214) 981-3800 - Telephone
(214) 981-3839 – Telecopy

Michael R. Cowen
State Bar No. 00795306
1325 Palm Boulevard
Brownsville, Texas 78520
(956) 541-4981 – Telephone
(956) 504-3674 – Telecopy

ATTORNEYS FOR PLAINTIFFS JOSE MIRELES and PATRICIA GENUCHI, on Behalf of Themselves and All Others Similarly Situated

Robert E. Davis
State Bar No. 05542000
of HUGHES & LUCE, L.L.P.
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500
(214) 939-6100 - FAX

Ruben R. Pena, P.C.
State Bar No. 15740900
Law Offices of Ruben R. Pena, P.C.
222 West Harrison Street
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Harlingen, Texas 78550
Telephone: (956) 412-8200

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David Brown
State Bar No. 03108700
Southwestern Bell Telephone Company
1616 Guadalupe, Room 600
Austin, Texas 78701-1298
(512) 870-5718

(512) 870-3420 - Telecopier

ATTORNEYS FOR DEFENDANT
SOUTHWESTERN BELL TELEPHONE COMPANY

NO. 98-07-3003-E

JOSE MIRELES AND	§ IN THE DISTRICT COURT
PATRICIA GENUCHI,	§
On behalf of	§
Themselves And All	§
Others Similarly	§
Situated,	§
Plaintiffs,	§
	§
vs.	§ CAMERON COUNTY EXAS
	§
SOUTHWESTERN BELL	§
TELEPHONE COMPANY,	§
Defendant.	§ 357TH JUDICIAL DISTRICT

NOTICE OF CLASS ACTION, PROPOSED SETTLEMENT, AND HEARING

THIS IS AN IMPORTANT NOTICE TO YOU ABOUT A LAWSUIT IN WHICH YOUR LEGAL RIGHTS MAY BE AFFECTED

NOTE: THIS IS NOT A LAWSUIT AGAINST YOU. You are not being sued. This Notice contains information regarding the proposed settlement of a lawsuit called *Jose Mireles and Patricia Genuchi, on behalf of themselves and all others similarly situated, vs. Southwestern Bell Telephone Company*, in the District Court of Cameron County, Texas, 357th Judicial District (the "Lawsuit"). You may be in the class of people defined below (the "Settlement Class") covered by a proposed settlement (the "Settlement") of the Lawsuit, and you and your community may be

entitled to receive certain benefits in accordance with the proposed Settlement of the Lawsuit. This Notice tells you if you are part of the Settlement Class, describes the Lawsuit and the benefits of the proposed Settlement, and tells you that the Judge who has jurisdiction over this case will hold a hearing to decide whether to approve the Settlement. This Notice describes your legal rights in connection with the hearing and the Lawsuit. All Settlement Class members who choose not to timely exclude themselves from the Settlement Class will receive the benefits of this Settlement and will be bound by the resulting Judgment in the Lawsuit.

I. DESCRIPTION OF THE LAWSUIT

Plaintiffs filed this Lawsuit against Defendant Southwestern Bell Telephone Company ("SWBT") on behalf of all Texas residents (which may include you) who were similarly situated to the Plaintiffs. In the Lawsuit, Plaintiffs allege that SWBT wrongfully overcharged certain individuals a "municipal fee" on their telephone bills. "Municipal fees" are fees municipalities charge to telecommunications providers, including SWBT, to recover the cost of administering the use of the public rights-of-way. For example, if you live in Dallas, your phone line runs from your house, apartment or place of business over the public rights-of-way, such as a street, to SWBT. The City of Dallas then charges SWBT a fee to recover the cost of administering the public rights-of-way.

SWBT pays the fee that is charged by the municipality. Under Public Utility Commission-approved tariff or state law, SWBT passes the fee

along to customers such as you. The amount of the fee you pay varies greatly, depending upon where you live and the amount of your phone bill, but the amount is only a small portion of your total bill amount. **SWBT does not keep any of the municipal fees it collects – all of the money goes to the municipalities.** Typically, municipalities then use the fees for a variety of civic purposes.

Generally speaking, Texas law allows SWBT to pass through to its customers the municipal fees that municipalities charge SWBT. This Lawsuit, however, alleges that SWBT was not permitted to pass to its customers the full amount of all municipal fees in certain circumstances. The Lawsuit alleges that SWBT should have filed a new or amended tariff with the Public Utility Commission in order to obtain approval to pass through all of the municipal fees to its customers. SWBT has not filed such a new or amended tariff addressing municipal fees. The Lawsuit contends that while SWBT can make class members (possibly such as you) pay portions of any municipal fees assessed, it cannot make customers pay the entire Municipal Fee, unless SWBT filed an appropriate tariff amendment.

SWBT vigorously denies the allegations in this Lawsuit. SWBT maintains that a 1978 tariff, filed with and approved by the Texas Public Utility Commission, authorizes the collection of municipal fees in the manner SWBT used. Moreover, in 1995, the Texas Legislature passed amendments to the Public Utility Regulatory Act, which SWBT maintains expressly approved SWBT's municipal fee collection practices.

Additionally, SWBT asserts other defenses that call into question the various legal theories upon which Plaintiffs seek to base their claims.

Class Counsel has conducted sufficient discovery so as to investigate the facts and applicable law regarding the matters raised in the Lawsuit. Class Counsel believes that the issues before the Court are extremely complex and there is great uncertainty as to the outcome of the litigation. More importantly, discovery in the Lawsuit revealed that it would be extraordinarily difficult, if not impossible, to identify the specific amounts that individual Settlement Class members might recover even if the Lawsuit were successful. In addition, Class Counsel has determined that the amounts that might be recovered by individual Settlement Class members would be quickly consumed by the overall notice and administration costs necessary to facilitate settlement, because the Settlement Class is exceptionally large (it is estimated at more than five million members), and because the amount of possible recovery varies greatly but generally is not a large sum of money. For these and other reasons (See Section II of this Notice.), Class Counsel has entered into a Settlement Agreement with Defendants dated December 15, 1999 (the "Settlement Agreement"). If the Settlement Agreement is approved by the Court, it will fully and finally resolve the claims asserted by Plaintiffs, on behalf of themselves and the Settlement Class.

II. REASONS FOR ENTERING INTO SETTLEMENT AGREEMENT

Plaintiffs and Defendant have agreed on all of the terms of the proposed Settlement through extensive; arms-length negotiations between Class Counsel and Counsel for Defendant. Class Counsel has entered into the proposed Settlement only after weighing the benefits of the Settlement against the probabilities of success or failure in the Lawsuit and the delays that would be likely if the Lawsuit proceeded to trial.

In deciding to enter into the Settlement Agreement, Plaintiffs considered all aspects of the Lawsuit. Some of the specific concerns included:

The risk that they may not prevail in the Lawsuit. Plaintiffs evaluated the very real possibility that they may not prevail in the Lawsuit because SWBT has on file a tariff that potentially covers the municipal fees in issue and has statutory authority to pass along municipal fee charges to its subscribers. As a result, the Court may have concluded that SWBT was well within its rights to pass along all municipal fees. Further, there is a specific statute that may absolve SWBT of any liability.

The risk that Plaintiffs may not be able to demonstrate any legal theory for any recovery.

The risk that even if Plaintiffs can demonstrate a general right of recovery, one or more of Defendant's defenses may be meritorious.

The risk that any recovery might be insufficient given the size of the Class to afford any real relief. Plaintiff considered that given the size of the Class and the time and expense required to determine the exact amount owed to each Class Member (which may well be impossible to determine in any event), virtually all Class Members may receive only a nominal recovery.

Although Defendant denies any wrongdoing and any liability whatsoever, Defendant believes that it is in its best interests to settle this Lawsuit on the terms set forth in the Settlement Agreement in order to avoid further expense and inconvenience in connection with the Lawsuit.

III. HOW THE SETTLEMENT WORKS

A. *Proceeding as a Class Action.* For purposes of the Settlement only, the Parties have agreed that the Lawsuit may proceed as a Class Action and have stipulated to the conditional certification of a class of individuals as defined below (known as the "Settlement Class"):

All persons or entities who currently reside in the State of Texas and who subscribe, or formerly subscribed, to telephone service provided by SWBT and pay, or paid, to SWBT a municipal fee, imposed pursuant to a municipal ordinance, other than an ordinance based upon a percentage of gross receipts, and collected pursuant to tariff or statute.

This means that if you are part of the Settlement Class, then this Lawsuit will affect your legal rights unless you decide to opt out. Furthermore, as a part of the Settlement, the

parties agreed to stipulate that Jose Mireles and Patricia Genuchi will serve as Class Representatives for the Settlement Class and that Jeffrey M. Tillotson, P.C., Michael P. Lynn, P.C., Thomas M. Melsheimer, P.C., John T. Cox HI, and Michael R. Cowen are to serve as Class Counsel for the Settlement Class.

B. *How the Settlement Works.* SWBT has agreed to pay or deliver ten million dollars in cash or service credits into a Settlement Fund. SWBT will receive certain credits against the Settlement Fund for expenses such as notice and attorneys' fees, but those credits are capped (e.g., up to $1.25 million for notice costs and 20% for attorneys' fees). In any event, SWBT shall provide ten million dollars of benefit. The Settlement Fund (less any credits) will be paid or delivered to the Telecommunications Infrastructure Fund Board ("TIFB") for administration. At least three million dollars of that sum will be a direct cash grant. The remainder will be in the form of credits for specific services provided by SWBT or its affiliates. The cash grant will be for certain specified purposes, but otherwise TIFB shall use the Settlement Funds in support of community networks as specified in the Settlement.

C. *Benefits of the Settlement.* In deciding to enter into this Settlement, Plaintiffs considered all of the benefits this Settlement provided to the Class. Some of these benefits include:

1. A total settlement value of ten million dollars;

2. Facilitation of the establishment of communication and information networks

designed to enhance the community and enrich lives;

3. Provision of funding necessary for the establishment of an initiative to involve Texas residents with local public schools, libraries, not-for-profit health care facilities and institutions of higher education to create and operate a multi-purpose, community-based telecommunications network; and

4. Provision of funding to enable equitable access to information, a broad range of enriched local content development, and local telecommunications planning and training. Information regarding the Settlement benefits is more particularly described in the Settlement Agreement.

Class Counsel determined that a settlement that provides benefits to various Texas communities in which Class Members reside rather than one that makes nominal, random payments to individuals that may or may not correspond to actual injuries suffered is preferable. The decision was based in part on the following:

• **Individual Relief May Not Be Possible Or Practical** - Discovery determined that SWBT cannot independently identify which Class Members suffered what damages. The administrative costs associated with trying to identify and then confirm individual recoveries on a case-by-case basis would exhaust any recovery.

• **The Damages May Only Have Been Recoverable From The Municipalities** - If the Plaintiffs prevailed in the Lawsuit, the funds may

only have been recoverable from the municipalities rather than SWBT. In such an event, any recovery would have negatively impacted the Plaintiffs and their communities. The Settlement Fund, however, takes nothing from the municipalities, but provides additional funds in the form of grants to the Telecommunications Infrastructure Fund Board (TIFB), resulting in a benefit to Class Members and their communities with no negative impact.

- **Providing Money To TIFB Provides Real Benefit** - The Settlement Funds will be disbursed to TIFB, a government agency which is constituted for the purpose of benefiting persons like the Class Members. Furthermore, certain restrictions and limitations have been placed on the use of the Settlement Funds to insure that the Settlement Funds inure primarily to the benefit of the Settlement Class. The TIFB will control the distribution of the Settlement Funds.

- **Providing The Money To The TIFB Maximizes Benefits** - Disbursement through the TIFB will utilize its pre-existing experience and infrastructure to administer the Settlement Funds effectively and efficiently. For example, by selectively combining the Settlement Funds with other TIFB monies, TIFB will multiply the benefits of the Settlement Funds and maximize benefits realization to the Class Members.

IV. NO FINDING ON THE MERITS

This Notice does not indicate any expression or opinion by the Court concerning the merits of the respective claims or defenses asserted by or against SWBT in the Lawsuit. This Notice is sent merely to advise you of the proposed settlement and dismissal of claims against SWBT and of your rights in-connection therewith.

V. COUNSEL FOR THE SETTLEMENT CLASS

The Court has appointed, for purposes of the proposed Settlement only, the following counsel as Counsel for the Settlement Class: Jeffrey M. Tillotson, P.C., Michael P. Lynn, P.C., Thomas M. Melsheimer, P.C., John T. Cox III, Lynn Stodghill Melsheimer & Tillotson, L.L.P., 750 North St. Paul Street, Suite 1400, Dallas, Texas 75201; Michael R. Cowen, Cowen & Livesay, 1325 Palm Boulevard, Brownsville, Texas 78250.

Class Counsel will seek an award of fees for their services to the Class. Class Counsel undertook this case on a contingent fee basis, meaning that they 1) have not been paid for any services performed to date and 2) assumed the risk that they might receive no fee whatsoever if the Plaintiffs did not prevail. Over time, as many as ten different lawyers from four different firms have contributed to this case. Class Counsel intends to petition the Court for an award of fees and expenses of twenty percent (20%) of the total benefit provided to the Class. This amount equals two million dollars. In no event shall the award of fees and expenses be greater than this number. The Court will make the final determination with respect to attorneys' fees and may award less

than this request, but in no event shall the award of fees be greater than this number. SWBT has agreed that it will not oppose the fee request. Class Counsel will be filing prior to the Settlement Hearing a detailed legal briefing supporting its fee request.

VI. COUNSEL FOR SWBT

Counsel representing Defendant SWBT are:

David F. Brown
Southwestern Bell Telephone Company
1616 Guadalupe
Room 600
Austin, Texas 78701-1298

Robert Edwin Davis
Hughes & Luce, L.L.P.
1717 Main Street
Suite 2800
Dallas, Texas 75201

VII. CLERK OF THE COURT

Aurora de la Garza
Cameron County District Clerk
974 E. Harrison Street
Brownsville, Texas 78520

VIII. RIGHTS AND OPTIONS OF CLASS MEMBERS

If you are a Settlement Class Member, you have the following options:

1. *You may remain a Settlement Class Member.* If you choose to remain a Settlement Class Member then you need take no action to receive the benefits of the settlement. Your

interests as a member of the Settlement Class will be represented by the Class Representatives and the above-listed Counsel for the Settlement Class. You will not be charged for their services. You will be bound by any judgment or other final disposition of this case and may participate as a member of the Settlement Class in any settlement.

2. *You may retain your own attorney to represent you at your own cost.* If you select this option, you must retain your own attorney and should immediately discuss your options with the attorney. You will be responsible for paying your own attorneys' fees.

3. *You may request exclusion from the Settlement Class.* If you choose to be excluded from the Settlement Class, you will not be bound by any judgment, disposition, or settlement of the Lawsuit. You will retain, and will be free to pursue, any claims you may have on your own behalf. If you wish to exclude yourself from the Settlement Class, you must mail a written Request for Exclusion to Counsel for the Settlement Class listed above and Counsel for Defendant listed above. Requests for Exclusion must contain the full name, current address, and telephone number of the person requesting exclusion. The written Request for Exclusion must be sent by U.S. Mail, first-class postage prepaid, on or before April 5, 2000.

4. *You may object to the Settlement.* If you object to the Settlement, you must comply with Paragraph X below.

IX. FINAL SETTLEMENT HEARING

A final Settlement Hearing will be held on April 27, 2000, at 10:30 a.m. before the Presiding Judge of the 357th District Court, Cameron County, Texas, Cameron County, Courthouse, Brownsville, Texas, for the purpose of determining whether the proposed Settlement is fair, reasonable, and adequate and should be finally approved and a final judgment entered in the Lawsuit. The hearing may be continued or adjourned without further notice other than announcement at the Final Settlement Hearing or at any adjournment or continuance thereof. The Settlement may be approved with modifications, if any, consented to by Plaintiffs and Defendant without further notice.

X. RIGHT TO OBJECT TO SETTLEMENT AND APPEAR AT FINAL SETTLEMENT HEARING

If you do not exclude yourself from the Settlement Class, you may object to the Settlement. Any Settlement Class Member who does not elect timely and valid exclusion from the Settlement Class and who objects to the proposed Settlement must file such objection and any supporting papers with the Clerk of the Court. Such objections must be filed with the Clerk of the Court on or before April 5, 2000. The objection must set forth the full name; current address, and telephone number of the person making the objection. In addition, the objection must include: (a) a written statement of the position the objector wishes to assert; (b) a written statement of the grounds therefor; and (c) copies of any papers, briefs, or other documents the objector wishes to submit in support of his/her position. Copies of the objection and supporting papers

must be mailed to Counsel for Plaintiffs and the Settlement Class and Counsel for Defendant identified above no later than April 5, 2000. Any member of the Settlement Class who intends to appear personally (or through separate counsel) to object to the Settlement on any grounds whatsoever must file with the Court a Notice of Intention to Appear. This notice must be filed with the Clerk of the Court, on or before April 5, 2111, at the address listed above. Copies of the Notice of Intention to Appear also must be mailed to Counsel for Plaintiffs and the Settlement Class and Counsel for Defendant identified above.

Any Settlement Class Member who does not properly file and serve a Notice of Intention to Appear at the Settlement Hearing will be prohibited from appearing at any hearing concerning this Settlement. Any Settlement Class Member who does not file objections in the time and manner described above is forever foreclosed from raising any objection to such matters.

XI. EFFECT OF SETTLEMENT APPROVAL

If the Settlement is approved, Plaintiffs and each member of the Settlement Class who has not requested proper and timely exclusion from the Settlement Class, and their respective heirs, executors, administrators, representatives, agents, partners, successors, assigns, parents, affiliates, subsidiaries, officers, directors, employees, agents, and attorneys agree to fully release and forever discharge SWBT and its present and former parents, subsidiaries, affiliates, officers, directors, employees, attorneys, agents, representatives, predecessors, successors

and assigns from any and all claims, actions, causes of action, rights or liabilities which existed before December 16, 1999, and are based on, arising out of, or in any way relating to or pertaining to:

a. Collection of Municipal Fees from subscribers who reside or have resided in a Texas Municipality with a Municipal Fee Ordinance other than a Gross Receipts Ordinance;

b. SWBT's practices, policies, and procedures, as well as all actions taken by SWBT in connection with the same, regarding the collection, accumulation, handling, custody, control, distribution or use of Municipal Fees collected, assessed or attempted to be charged by SWBT to subscribers who reside or resided in a Texas Municipality with a Municipal Fee Ordinance other than a Gross Receipt Ordinance.

c. Any of the claims stated in the Lawsuit; and

d. All claims arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement or resolution of the Lawsuit.

XII. INFORMATION YOU MUST INCLUDE IN ANY DOCUMENT YOU SEND REGARDING THIS CASE

In sending any document to the Court or to Counsel for Plaintiffs and the Settlement Class and Counsel for Defendant, it is important that both your envelope and any documents inside contain the following case name and identifying numbers:

Jose Mireles and Patricia Genuchi, on behalf of themselves and all others

similarly situated, vs. Southwestern Bell Telephone Company, Cause No: 98-07-3003-E, in the District Court of Cameron County, Texas, 357th Judicial District.

In addition, you must include your full name, address, and telephone number.

DO NOT CALL SOUTHWESTERN BELL REGARDING THIS SETTLEMENT OR NOTICE.

XIII. FOR MORE INFORMATION

THIS NOTICE IS ONLY A SUMMARY. The full Settlement Agreement, the Lawsuit, Orders, and other documents on file in this case, may be inspected and copies made thereof at the Court Clerk's office at the address listed above. DO NOT WRITE OR TELEPHONE THE CLERK'S OFFICE if you have any questions about this Notice or the Settlement. Address any questions regarding this Notice or the proposed Settlement IN WRITING to Counsel for the Settlement Class identified above.

DO NOT TELEPHONE THE CLERK OF COURT OR SOUTHWESTERN BELL TELEPHONE COMPANY REGARDING THIS NOTICE. DIRECT TELEPHONE INQUIRIES TO:

1-800-982-1013.

BY ORDER OF 357TH JUDICIAL DISTRICT COURT OF CAMERON COUNTY, TEXAS

All Tx. Bus. & Res. 1/00

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No. 07-859

FILED
FEB 29 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

CHEMJECT INTERNATIONAL, INC.,
Petitioner,
v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
JOSE MIRELES, AND PATRICIA GENUCHI,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas, Thirteenth District

BRIEF IN OPPOSITION FOR SOUTHWESTERN BELL TELEPHONE COMPANY

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February 29, 2008

QUESTIONS PRESENTED

1. Whether a Texas intermediate appellate court properly rejected petitioner's due process claim because petitioner had failed to explain why a separate state-law procedure did not provide an adequate mechanism to raise its arguments.

2. Whether petitioner has waived its other issues, which were not presented or addressed below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Southwestern Bell Telephone Company states the following:

Southwestern Bell Telephone Company is a wholly owned, indirect subsidiary of AT&T Inc. AT&T Inc. has no parent corporation. No publicly held company owns 10% or more of AT&T Inc.'s stock.

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INTRODUCTION

The petition raises no issue meriting review by this Court. The Texas intermediate appellate court rejected petitioner's due process argument because petitioner had not explained why a separate state-law mechanism was not an adequate avenue for petitioner, an absent member of the class, to bring a post-judgment attack on an approved class-action settlement. The correctness of the Texas court's determination as to whether petitioner had adequately addressed that state-law issue does not merit plenary review by this Court; nor is review warranted as to whether, as a matter of Texas law, the other procedural mechanism would be available on the specific facts of this case.

Beyond that, petitioner can identify no precedent from this Court or any other court establishing, on anything like the unusual facts of this case, that its due process rights were denied here. Simply put, no case establishes that an unnamed class member, having received adequate notice before a settlement is approved, has a due process right to seek to set aside that settlement at any time years later. There is thus no division of authority even arguably warranting review in this case.

Petitioner's other arguments were not even raised below and thus are not properly presented here.

STATEMENT OF THE CASE

1. This Suit Is Filed and Settled, and the Trial Court and Court of Appeals Approve the Settlement

a. In July 1998, two customers of Southwestern Bell's local telephone service (respondents here) sued Southwestern Bell in Texas state court on behalf of themselves and a class of similarly situated consumers. *See* Pet. App. 4. The suit challenged Southwestern Bell's practice of collecting municipal fees from customers of its local telephone service. *See id.* at 96. Southwestern Bell paid those fees to municipalities to compensate them for Southwestern Bell's use of public rights of way. *See id.* According to the complaint, Southwestern Bell's tariffs did not permit it to pass on to its customers the full amount of the fees in all circumstances. *See id.* at 96-97. Southwestern Bell disputed the complaint's allegations, explaining that both its tariffs and Texas law authorized its conduct. *See id.* at 97.

In December 1999, to avoid a protracted and costly legal battle, the parties entered into an agreement to resolve the dispute. *See id.* at 4. Even if the plaintiffs ultimately had prevailed in the litigation, the amount of any individual class member's damages likely would have been insignificant, and ascertaining the amount owed each class member would have been an unduly burdensome and expensive endeavor. *See id.* at 43, 46-47, 75, 98, 100. Accordingly, Southwestern Bell agreed to create a settlement fund worth $10 million in cash and services. *See id.* at 25, 72-73, 81-82. The proceeds of the fund (less deductions for fees and expenses) were to be provided to the Texas Telecommunications Infrastructure Fund Board to support the Texas Internet Collaborative

Community Network Plan – an effort "to provide online Internet-based community information and resource networks for Texas communities." *Id.* at 74; *see id.* at 81-83, 101-03.[1]

b. The trial court conditionally certified the settlement class and preliminarily approved the settlement. *See* Pet. App. 4. It also reviewed and approved the form and content of the notice informing the class members of (i) the suit, (ii) the terms of the settlement, and (iii) their rights to opt out of the class or object to the settlement, and to appear at a fairness hearing. *See id.*; *see also id.* at 95-110. The notice was mailed to class members as an insert in their monthly bills from Southwestern Bell and published in major newspapers throughout Texas on two separate dates. *See Northrup v. Southwestern Bell Tel. Co.*, 72 S.W.3d 16, 19 (Tex. App. 2002) ("*Northrup II*").

Petitioner received that notice and neither opted out of the class nor objected to the settlement. *See* Pet. App. 4. The trial court held a two-day class-certification and fairness hearing, which petitioner did not attend. *See id.* A small number of other unnamed class members did file objections to the settlement. *See id.* One of the objectors was an entity called Southwestern Tariff Analyst, which was

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[1] Petitioner inaccurately suggests that $1.25 million of the $10 million settlement amount was "paid" to Southwestern Bell for administrative expenses. Pet. 3; *see also* Pet. ii n.2. Although the settlement agreement permitted Southwestern Bell to offset the settlement payment by up to $1.25 million for costs incurred in providing notice to the class, *see* Pet. App. 81-82, those costs in fact amounted to less than $400,000, *see id.* at 38-39.

represented by two lawyers who also are counsel for petitioner in this Court. *See id.* at 27.

c. In May 2000, the trial court overruled the objections to the settlement, certified the settlement class, and entered a final judgment approving the settlement. *See* Pet. App. 34-41. In so doing, the court made numerous findings of fact concerning the fairness of the settlement. *See id.* at 42-50. In particular, the court found that the notice provided to the class "was the best notice practicable under the circumstances," including "individual notice to all members of the Settlement Class who could be identified through reasonable effort." *Id.* at 44. It found that the class notice "fairly and accurately" informed the class members of "the nature of the suit" and advised them that they had a right to opt out, that the judgment approving the settlement would bind all class members who did not opt out, and that any class member "could enter an appearance through counsel or otherwise object to the settlement." *Id.* at 45.

The trial court further found the consideration provided by Southwestern Bell – a $10 million settlement fund – to be "fair, appropriate, adequate, and the best way to compensate the Settlement Class under the circumstances." *Id.* at 46. The court explained that "it would be extraordinarily difficult, if not impossible, to identify many of the specific members of the Settlement Class" and that, "even if individual members were identified, the administrative costs in verifying the amounts that such members had paid to [Southwestern Bell] would almost certainly exceed any individual recovery." *Id.* The court also noted that, because Southwestern Bell "had numerous, substantial defenses to the merits of"

the plaintiffs' claims, *id.*, and the plaintiffs would incur "substantial" costs in litigating the claims, *id.* at 47, there was a "real possibility that the Settlement Class would receive nothing if the Action were litigated," *id.*

d. Two of the objectors appealed. *See* Pet. App. 4. Before reaching the merits of the appeal, the Texas court of appeals held, as a matter of first impression under Texas law, that unnamed class members who did not intervene in the litigation can appeal a judgment that both certifies a settlement class and approves a settlement. *See Northrup v. Southwestern Bell Tel. Co.*, 72 S.W.3d 1, 10-12 & n.17 (Tex. App. 2001) ("*Northrup I*").[2]

In February 2002, the Texas court of appeals issued its opinion upholding the trial court's approval of the settlement. *See Northrup II*, 72 S.W.3d 16. Specifically, it rejected the claim that the form of the class notice was defective, affirming the trial court's finding that the combination of mailings and publication employed "was the 'best notice practicable' for advising the unnamed class members of the pendency of the class action." *Id.* at 19. The court also concluded that the content of the notice fully complied with the Texas analogue to Federal Rule of Civil Procedure 23. *See id.* at 20. The court further held that the notice properly informed the class members about class counsel's fees. *See id.* at 20-21.

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[2] *See also City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 752 (Tex. 2003) ("an unnamed class member is not required to intervene in order to appeal its objections to a class settlement"); *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) (holding that, under federal law, an unnamed class member who objects in the trial court to the approval of a settlement can appeal without intervening).

Turning to the objectors' complaints about the fairness of the settlement, the court of appeals reviewed the record from the fairness hearing and concluded that "the trial court based its approval of the settlement on consideration of the appropriate factors." *Id.* at 21. In particular, the record showed that "determining the exact amount of damages for each individual plaintiff would be time-consuming and excessively difficult" and that "the amount that would likely be owed to each plaintiff would have been very small – *i.e.*, around *one dollar*." *Id.* (emphasis added).

In May 2002, the two objectors each filed a petition for review in the Supreme Court of Texas.

2. After the Court of Appeals Approved the Settlement, Petitioner Attempts an Untimely Intervention in the Litigation

a. In March 2003, while the objectors' petitions for review remained pending in the Supreme Court of Texas (and almost three years after the trial court approved the settlement), petitioner attempted to intervene in the trial court by filing a motion to set aside the judgment and a petition in intervention. In support of those pleadings, petitioner alleged that it had received information (from Southwestern Tariff Analyst, the entity petitioner's counsel had represented in objecting to the settlement) indicating that the settlement was tainted by fraud. *See* Pet'r Ct. App. Br. 5. Southwestern Bell opposed petitioner's efforts, explaining that the trial court lacked jurisdiction to set aside the judgment or allow intervention more than 30 days after judgment. *See, e.g., First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex. 1984) (per curiam) (holding that "a plea in intervention comes too late if filed after judgment and may not be

considered unless and until the judgment has been set aside" and that a trial court "lack[s] jurisdiction to modify [a] judgment" more than 30 days after it is entered). The trial court initially took no action regarding petitioner's attempted intervention. *See* Pet. App. 5-6.

b. In the summer of 2003, the Governor of Texas eliminated the Texas Telecommunications Infrastructure Fund Board – the entity designated in the settlement agreement to receive the proceeds of the settlement fund. *See* Pet. App. 60, 62-65. The Board's primary function during its existence had been to provide and administer funding grants to entities for use in improving telecommunications infrastructure in Texas. *See id.* at 62. The Governor assigned the Board's functions to the Texas Workforce Commission. *See id.* at 63. Petitioner amended its motion to set aside the judgment to assert that the elimination of the Telecommunications Infrastructure Fund Board rendered the settlement agreement void. *See* Pet. 4-5.

c. In September 2003, the Supreme Court of Texas granted one of the objectors' petitions for review of the court of appeals' decision affirming the approval of the settlement agreement (that court had earlier denied the other petition). During briefing in the Texas high court, petitioner submitted two briefs *amicus curiae* and one motion to abate the appeal, raising, among other things, the same claim that it asserts here (namely, that the Texas Governor's elimination of the Telecommunications Infrastructure Fund Board requires overturning the judgment approving the settlement).[3] One of those briefs was

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[3] *See* Brief of Amicus Curiae Chemject Int'l, Inc. at 2, *Northrup v. Southwestern Bell Tel. Co.*, No. 02-0444 (Tex. filed

filed in response to a court order specifically directing the parties to address whether the case should be remanded to the trial court for reconsideration in light of the elimination of the Telecommunications Infrastructure Fund Board. In January 2004, after having an opportunity to consider fully the implications of the elimination of the Telecommunications Infrastructure Fund Board, the Supreme Court of Texas dismissed the objector's petition as improvidently granted. *See* Pet. App. 5.

d. With appellate review of the settlement complete, Southwestern Bell and the class representatives jointly moved the trial court to establish a settlement administration. *See* Pet. App. 6. The parties' motion provided for the appointment of a settlement administrator and set forth detailed procedures for transferring the settlement amount to the Texas Workforce Commission (the successor to the Telecommunications Infrastructure Fund Board) to be used to support the Texas Internet Collaborative Community Network Plan, as described in the settlement agreement. The trial court granted that motion. *See id.* at 32-33; *see also id.* at 30-31.[4]

In July 2004, petitioner filed a motion for reconsideration of the order establishing a settlement

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May 20, 2003); Unnamed Class Member Chemject Int'l, Inc.'s Emergency Mot. To Abate This Appeal at 2-4, *Northrup v. Southwestern Bell Tel. Co.*, No. 02-0444 (Tex. filed Sept. 5, 2003); Brief of Amicus Curiae Chemject Int'l, Inc. in Response to the Questions Posed by the Court at 4-5, 6, *Northrup v. Southwestern Bell Tel. Co.*, No. 02-0444 (Tex. filed Nov. 15, 2003).

[4] Southwestern Bell has paid the full settlement amount (less fees and expenses) to the Texas Workforce Commission, which is using the settlement payment to implement the Texas Internet Collaborative Community Network Plan.

administration. *See id.* at 6. The trial court did not rule on petitioner's motion for reconsideration. Instead, in September 2004, the court entered an order rejecting petitioner's attempt to intervene and to set aside the judgment, explaining that it lacked jurisdiction to grant petitioner's requests. *See id.* at 29. Petitioner appealed. *See id.* at 6.

3. Petitioner Also Initiates a Separate Proceeding Attacking the Judgment Approving the Settlement

In May 2004, while petitioner's petition in intervention and motion to set aside the judgment were pending in the trial court, petitioner initiated a separate proceeding attacking the judgment approving the settlement agreement. Petitioner filed a petition for bill of review, purportedly on behalf of itself and a class of Southwestern Bell customers. *See* Pet. App. 6. A bill of review is "an equitable proceeding brought by a party seeking to set aside a prior judgment." *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam).

In the petition for bill of review, petitioner alleged that the judgment approving the settlement should be set aside because Southwestern Bell and the class representatives had made false representations to the trial court and the class in securing approval of the settlement. *See* Pet. App. 7. In October 2004, Southwestern Bell and the class representatives moved for summary judgment, contending that petitioner had not put forth evidence to support its allegations. The trial court granted that motion and denied the bill of review with prejudice. *See id.* Petitioner appealed.

4. The Court of Appeals Upholds the Orders Denying Petitioner's Untimely Attempt To Intervene and Its Attack on the Judgment

In the decision under review, the Texas court of appeals issued a single opinion disposing of both petitioner's appeal of the denial of its attempt to intervene and set aside the judgment in the underlying class action and its appeal of the denial of the bill of review. *See* Pet. App. 3-28.

As to the former, the court of appeals held that the trial court did not err in refusing petitioner's attempt to intervene, because the lower court lacked jurisdiction to permit the intervention. *See id.* at 8-9. The court also noted that petitioner had argued, "without supporting authority, that the striking of its petition in intervention would constitute a due process violation." *Id.* at 10. The court rejected that notion, explaining that petitioner had failed to offer any reason "why the bill of review" proceeding that it had filed did "not satisfy its due process needs." *Id.* at 10-11. In addition, the court ruled that, insofar as petitioner sought to have its appeal (which it filed in October 2004) construed as an appeal of the trial court's May 2000 judgment approving the settlement agreement, the appeal was untimely (by several years). *See id.* at 9-10.

Turning to petitioner's appeal of the denial of its petition for bill of review, the court of appeals concluded that petitioner had not demonstrated fraud justifying setting aside the judgment approving the settlement. *See id.* at 15-19. Petitioner also contended that, to the extent that the misrepresentations it had alleged did not satisfy the requirements for setting aside the judgment in a bill of review proceeding, the denial of the bill of review violated its

and the other unnamed class members' due process and equal protection rights. *See id.* at 21-22. The court of appeals found, however, that petitioner had "raised these constitutional issues for the first time on appeal" and that, therefore, "they are waived." *Id.* at 22. Thus, the court affirmed the denial of the petition for bill of review. *See id.* at 24.

Petitioner filed separate petitions for review in the Supreme Court of Texas challenging the intermediate appellate court's decisions. That court denied both of those petitions. Petitioner has not sought further review of the denial of its petition for bill of review. *Cf.* Pet. 35 & n.8.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S DUE PROCESS CLAIM DOES NOT WARRANT REVIEW

Petitioner's principal claim is that due process required the Texas courts to allow it to intervene and to seek to set aside the judgment approving the settlement agreement after the elimination of the Telecommunications Infrastructure Fund Board. *See* Pet. i (Question 1(a)). That claim does not warrant review.

A. As an initial matter, the Texas courts did not find that petitioner lacked any avenue to challenge the settlement even though it first sought to intervene to attack the agreement three years after judgment. To be sure, as explained by the Texas intermediate appellate court, the trial court lost "plenary jurisdiction" no later than 105 days after it entered judgment in May 2000. Pet. App. 9. But that holding did not necessarily mean that petitioner could not be heard even at that late date. As the Texas appellate court explained, "Chemject filed a separate bill

of review proceeding," but never "explained why the bill of review [proceeding] does not satisfy its due process needs." *Id.* at 10-11. It was the potential availability of that separate proceeding under state law – an issue that, the Texas appellate court made clear, petitioner had not addressed – that led the court to conclude that petitioner's due process argument was "not persuasive." *Id.* at 11.

The dispositive point to the Texas appellate court was thus one of state law and, more specifically, the fact that petitioner had failed to address a significant issue of state law relevant to its due process arguments. That case-specific determination involving which state-law arguments had been adequately addressed in appellate proceedings raises no general federal-law concern meriting review by this Court. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("This Court . . . repeatedly has held that state courts are the ultimate expositors of state law and that we are bound by their constructions except in extreme circumstances[.]") (citations omitted).

Petitioner takes issue with the Texas court's analysis of state law, suggesting that, because it allegedly seeks "*enforcement*" of the judgment, a bill of review proceeding would not be the proper procedure under Texas law. *See* Pet. 31-35. As a threshold matter, that assertion does not address what the Texas court found to be petitioner's failure adequately to explain in its appellate presentation why the bill of review proceeding would be inadequate. Beyond this, the proper scope of a bill of review proceeding obviously is a state-law issue that does not warrant plenary review. Presumably recognizing this fact, petitioner does not challenge the denial of the bill of review. That failure further undermines petitioner's due

process claim. *Cf. Dixon v. Love*, 431 U.S. 105, 113-14 (1977) (additional process would not help avoid error where validity of underlying decisions had not been challenged on appeal). In all events, as discussed below, *see infra* Part I.C.1, even on the merits, petitioner's state-law argument depends on the mistaken premise that it was seeking to enforce the judgment, not, as is in fact the case, set it aside. When that premise is corrected, petitioner's argument fails even as to state law.

Petitioner cites (at 33-34) *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988), in support of its position, but that case simply holds that a party that had not received proper notice of a prior action in which a default judgment was entered against it could not be required to show a "meritorious defense" to maintain a bill of review proceeding. *See id.* at 86. There is no dispute here that petitioner received legally adequate notice before judgment was entered. *See* Pet. App. 44-45. Thus, to the extent *Peralta* is relevant here, it is because it reiterates the Court's "disinclin[ation] to become involved in resolving disputes about [state] law that should have been presented to the state courts," 485 U.S. at 86, not for any principle of due process law.

B. Even aside from these dispositive case-specific points of state law, review is not warranted here because petitioner identifies no authority supporting its claim that its due process rights were violated on the facts of this case. Thus, there is no conflict between the decision below and the decisions of this Court or the decisions of any federal appellate court or state supreme court.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court articulated the due process rights

of absent class members. The right that petitioner claims – a right to seek to set aside a settlement years after it has been approved – is not one of those identified by the Court. *Shutts* was a state class action for small sums of interest on royalty payments suspended on the authority of a federal regulation. *Id.* at 800. This Court held that, before a state court can "bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection." *Id.* at 811-12 (footnote omitted). Unnamed class members must receive "notice plus an opportunity to be heard and participate in the litigation," as well as "an opportunity to remove [themselves] from the class." *Id.* at 812. Further, the class representatives must "adequately represent the interests of the absent class members." *Id.*; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847-48 (1999) (reiterating the *Shutts* requirements).

Here, the "minimal" due process requirements set forth in *Shutts* were fully satisfied. The Texas courts found (and petitioner does not dispute) that petitioner, along with its fellow class members, received notice of (i) the suit, (ii) the terms of the settlement, and (iii) the rights to opt out of the class or object to the settlement, and to appear at a fairness hearing. *See* Pet. App. 44-45; *Northrup II*, 72 S.W.3d at 19-20. In addition, the trial court found that the class representatives adequately represented the interests of the unnamed class members (including petitioner). *See* Pet. App. 43. Thus, petitioner received all of the process to which it was entitled under this Court's cases, and it cites no cases to the contrary.

Indeed, petitioner cites no case from *any* court establishing the proposition that an unnamed class

member is entitled as a matter of due process to attack a class-action settlement at any time, no matter the adequacy of the notice it received prior to judgment or how long it has sat on its rights. Petitioner has thus cited no precedent that supports the position that it would have to establish to prevail here.

C. Seeking to bolster its unsupported claim, petitioner cites a few lower court cases allowing, as a matter of procedural law, post-judgment motions *to enforce* class-action settlements and judgments. *See* Pet. 28-29. Those cases provide no support for petitioner's position, and certainly provide nothing like a split of authority warranting review by this Court.

1. As an initial matter, petitioner seeks *to set aside* – not, as in the cases it cites, enforce – the judgment approving the settlement agreement. Petitioner's pleadings made clear its desire to invalidate the judgment and proceed with the litigation as if it had never been settled. *See* Supplement to Motion To Set Aside Settlement Agreement at 5 (Cameron Cty., Texas Dist. Ct. filed May 29, 2003) (contending that, as a result of the elimination of the Telecommunications Infrastructure Fund Board, "the settlement is 'void and of no effect' and should be 'treated as vacated'" and "urg[ing]" the trial court "*to set aside* the settlement agreement") (emphasis added); Chemject Int'l, Inc.'s Emergency Motion To Reconsider and Vacate the Court's Order of June 17, 2004 and Motion To Set a Hearing on Chemject's Motion To Set Aside Settlement Agreement at 11 (Cameron Cty., Texas Dist. Ct. filed July 14, 2004) (arguing that the trial court "must declare the Settlement Agreement and Judgment void *and return the parties to their status quo before the date of the settlement*") (emphasis added).

Furthermore, petitioner's suggestion (at 30) that the trial court could have enforced the agreement by setting it aside rests on a misinterpretation of the settlement agreement. Petitioner relies on the following language in the agreement:

> [I]f the settlement contemplated by this Agreement is not concluded substantially as described in this Agreement with an order of the Court approving the settlement, the Agreement and all other acts taken to effect a proposed settlement will be void and of no effect and will not be admissible by or against any Party to this Agreement.

Pet. App. 88. In petitioner's view, the elimination of the Telecommunications Infrastructure Fund Board meant that the settlement could not be "concluded substantially as described in th[e] Agreement" and, thus, the agreement should be considered "void and of no effect" in accordance with its terms. *Id.*; *see, e.g.*, Pet. 31.

Petitioner's claim founders on the plain language of the agreement, which makes clear that the parties intended the agreement to be void only if it was "not concluded substantially as described in th[e] Agreement *with an order of the Court approving the settlement*." Pet. App. 88 (emphasis added). Here, the trial court issued a final judgment approving the settlement agreement, *see id.* at 34-41, and that judgment was upheld on appeal. Thus, the agreement *was* "concluded substantially as described in th[e] Agreement with an order of the Court approving the settlement." No basis exists for invoking the provision on which petitioner relies.

Additionally, if (as petitioner suggests) the parties had intended the settlement to collapse if the

Telecommunications Infrastructure Fund Board was eliminated, they easily could have said so. For that matter, petitioner – which received notice of the settlement and had an opportunity to object to it (*see* Pet. App. 4) – could have raised this issue at the fairness hearing, or opted out of the settlement altogether. But it did not do so. Petitioner sat on its rights, and the Texas courts therefore properly rejected its belated attempt to unwind the final judgment approving the settlement.

In all events, the fact that petitioner's argument that its rights were violated rests on the particular language of this agreement confirms that the petition seeks to raise only case-specific issues that do not present a question worthy of this Court's plenary review.

Petitioner incorrectly claims (at 29-30) that *Perez v. Rent-A-Center, Inc.*, 892 A.2d 1255, *clarified on other grounds on denial of recon.*, 902 A.2d 1232 (N.J. 2006), *cert. denied*, 127 S. Ct. 984 (2007), supports its interpretation of the settlement agreement. The court there indicated only that the settlement in that case would have been void had it not been consummated, but said nothing about the type of event that might prevent consummation of the settlement. *See id.* at 1263. It thus sheds no light on the fact-bound issue of whether the elimination of the Telecommunications Infrastructure Fund Board implicates the validity of the settlement in this case. Moreover, the settlement agreement in *Perez* provided that the settlement would be void if it was "not consummated *for any reason whatsoever*." *Id.* (internal quotation marks omitted; emphasis added). In contrast to that broad language, the provision on which petitioner

relies would have applied only if the trial court did not approve the settlement.

2. Because petitioner seeks to set aside, not enforce, the judgment approving the settlement agreement, none of the authorities that it cites supports its due process claim.

Petitioner relies (at 28) on *Gates v. Cook*, 234 F.3d 221 (5th Cir. 2000), a civil rights class action brought by HIV-positive prisoners in Mississippi seeking injunctive relief from discriminatory conditions of confinement. *Id.* at 225. Counsel appointed to represent the class showed little enthusiasm for the task, *see id.* at 225 & n.1, and quickly reached a settlement with the defendants that provided little relief to the prisoners, *see id.* at 225-26. The district court entered a consent decree and retained jurisdiction to monitor compliance with its terms. *See id.* at 226. After four years in which the prisoners' conditions of confinement improved little, several class members requested to intervene in the litigation and filed a motion to substitute ACLU lawyers as class counsel (which was supported by at least 80 percent of the class). *See id.* at 226 & n.3, 229. The district court denied those requests and issued an order barring contact between the ACLU lawyers and the class members. *See id.* at 226.

The Fifth Circuit reversed both the no-contact order, which it held violated the class members' First Amendment rights, *see id.* at 227, and the denial of the substitution motion, explaining that class counsel's "nonfeasance" justified the "rare remedy of substitution," *id.* at 228. The court found it "unnecessary" to address the intervention motion, which also sought only to substitute the ACLU lawyers as class counsel. *Id.* at 228 n.6. The Fifth Circuit also

rejected the contention that the substitution motion was untimely, explaining that "such motions made during the ongoing administration of a class action settlement by a district court are not per se untimely." *Id.* at 228-29. As authority, the court cited *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), in which this Court held that unnamed class members could intervene for purposes of appealing a denial of class certification, where they did so within the time for filing an appeal. *See id.* at 395-96 & n.16.

Here, petitioner requested neither substitution of class counsel nor intervention within the appropriate time period for purposes of appealing the denial of class certification.[5] Instead, petitioner sought *to set aside the judgment*. Nothing in *Gates* or *McDonald* suggests that federal procedure would permit the relief petitioners seek, much less that the Due Process Clause requires such relief on the very different facts presented here, where there has been nothing like the extraordinary finding of "nonfeasance" by class counsel.

Nor does petitioner advance its cause by citing (at 28) *Kortebein v. American Mutual Life Insurance Co.*,

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[5] Nor would there have been any basis to substitute counsel. *See Northrup II*, 72 S.W.3d at 21 (noting with approval testimony that class counsel "was competent to perform its function"); Pet. App. 46 (finding that "the amount and nature of the discovery taken by class counsel was reasonable under the circumstances"), 47 (finding that "class counsel collectively have sufficient involvement, competency, and experience in class litigation to merit this Court giving some weight to their recommendation" that the trial court approve the settlement), 48 (finding that "the Action was hotly contested" and that "there was no collusion among counsel for the Settlement Class and counsel for [Southwestern Bell]").

49 S.W.3d 79 (Tex. App. 2001). Even if *Kortebein* (another Texas intermediate appellate decision) did conflict with the decision below, a division of authority within a State's intermediate appellate courts does not warrant this Court's review. *See* Sup. Ct. R. 10; *cf. Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

In any event, there is no conflict between the decision below and *Kortebein*. There, plaintiffs filed a nationwide class action against an insurance company in Texas state court. *See* 49 S.W.3d at 82. The parties settled the case and the court entered a final judgment. *See id.* at 82-83. Subsequently, an unnamed member of that class filed suit against the insurance company in Illinois asserting the same claims. *See id.* at 83-84. The insurance company asked the Texas trial court to enforce its judgment by enjoining the Illinois plaintiffs from proceeding with their suit. *See id.* at 84. The trial court issued the requested injunction, and the court of appeals affirmed, explaining that "[e]very court with jurisdiction to render a judgment has the inherent power to enforce its judgments." *Id.* at 88-89.

Unlike in *Kortebein*, petitioner does not seek to enforce the trial court's judgment approving the settlement agreement. Instead, it wishes to set aside that judgment.[6] *Kortebein* supports the result here,

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[6] Like *Kortebein*, *In re VMS Securities Litigation*, 145 F.R.D. 458 (N.D. Ill. 1992), *aff'd in relevant part, vacated in part*, 21 F.3d 139 (7th Cir. 1994), which petitioner also cites (at 28), holds only that a district court can enjoin attempts collaterally to attack a class-action judgment; it therefore does not support petitioner's due process claim.

insofar as it rejects an unnamed class member's attempt to upset a final judgment approving a settlement.

D. Finally, petitioner briefly asserts (at 30-31) that the court below denied it due process by concluding that its appeal was untimely to the extent it sought review of the trial court's May 2000 judgment approving the settlement agreement (*see* Pet. App. 9-10). That assertion also is unavailing.

It is well-settled that "the Federal Constitution guarantees no right to appellate review" in the first place. *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion)).[7] To be sure, a State that chooses to provide appellate review cannot do so in a discriminatory manner. But Texas law, like federal law, generally requires appeals in civil cases to be filed within 30 days after entry of judgment. *See* Tex. R. App. P. 26.1; Fed. R. App. P. 4(a)(1)(A). Petitioner makes no attempt to explain how the application of that time limit to this case resulted in unconstitutional discrimination against it (nor could it). *Cf. Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007) (holding that federal courts of appeals lack jurisdiction to consider untimely appeals in civil cases).

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[7] *See National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 43 (1954) ("While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process."); *see also McKane v. Durston*, 153 U.S. 684, 687 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.").

II. PETITIONER WAIVED THE OTHER ISSUES MENTIONED IN THE PETITION

Petitioner's questions presented include two additional issues – namely, (i) whether the trial court should have considered a request to remove the class representatives and class counsel, and (ii) whether the Fourteenth Amendment required the trial court to provide the absent class members with notice and an opportunity to be heard before deciding the parties' motion to establish a settlement administration. *See* Pet. i (Questions 1(b), 2). Neither of those issues was properly presented to, or passed on by, the Texas court of appeals. *See* Pet. App. 7-11; Pet'r Ct. App. Br.[8] Therefore, the issues are not properly presented for this Court's review. *See, e.g.*, *Howell v. Mississippi*, 543 U.S. 440 (2005) (per curiam) (dismissing the writ as improvidently granted where the question was neither presented nor passed on in the state court); *Adams v. Robertson*, 520 U.S. 83 (1997) (per curiam) (same). Moreover, even if those issues had been presented and passed on below, petitioner failed to discuss them in the body of the petition. *See* Pet. 27-35; *see also* Sup. Ct. R. 14.4 ("The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.").

Similarly, petitioner fleetingly mentions a claim that the trial court violated petitioner's rights under the Equal Protection Clause by granting the motion

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[8] *See also Moser v. Roberts*, 185 S.W.3d 912, 916 (Tex. App. 2006) (refusing to consider an argument that was not supported "with clear and concise arguments"); Tex. R. App. P. 38.1(h) (a party's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities").

to establish a settlement administration filed by Southwestern Bell and the class representatives, but denying petitioner's motion to set aside the judgment. *See* Pet. 31. That claim of disparate treatment – which appears only in a paragraph without supporting authority – was neither raised nor decided below. *See* Pet. App. 7-11; Pet'r Ct. App. Br. It therefore is not properly presented here. *See Howell*, 543 U.S. 440; *Adams*, 520 U.S. 83.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[9] Moreover, the equal protection claim lacks merit. The trial court treated petitioner's filings different from respondents' motion because it had jurisdiction to address and grant respondents' motion but lacked jurisdiction to consider petitioner's motion to set aside the final judgment. "Equal protection does not require that all persons be dealt with identically" (or that all motions be granted no matter how far-fetched); rather, it requires only "that a distinction made have some relevance to the purpose for which the classification is made." *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966). Abiding by jurisdictional limits does not violate equal protection.

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February 29, 2008